March 08, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am pleased to be writing in support of the application of Amy Hayes, Harvard Law School Class of 2022, for a clerkship position in your chambers. I know Amy as a student in my first year Torts class during her first semester of law school and again as a student in the advanced research and writing seminar I taught in spring term 2021. In addition, I was the Faculty Section Leader for Amy's first year section during her entire first year, which provided me with additional opportunities outside of the classroom to work with and to get to know her. Amy has been an active and valued participant in classroom discussions; she is hard working and committed to gaining all the skills necessary to become an outstanding attorney on behalf of her clients. Indeed, it is Amy's drive to represent individual clients and help address their problems through law that prompted her a few years ago to switch careers and go to law school and that remains now her main driver in planning for her career as a lawyer after she graduates.

I first met Amy in Torts in the Fall of 2019. Torts is a classic first-year law school class. There were about eighty students in the class, lots of volunteering and cold calling, and the entire grade is based on an anonymously graded final written exam. Amy was great in class. She was one of my most active volunteers: never shy about making a point, asking a question, or being questioned.

Amy was also a clear community builder in class that semester and during her entire first year. This is an important, very positive attribute. Whether a particular first year section at Harvard Law School — about eighty students who have all of their first year classes together during the two semesters of their first year — has a good or bad year turns mostly on whether a few students within that section work hard to establish a supportive, positive culture within the section. Amy did just that, to the great benefit of all the students. It allowed them to learn together in a cooperative way and reduced considerably the overall stress that often otherwise undermines learning and individual spirit during the first year of law school. Amy promoted a strong sense of mutual respect and collegiality within the section.

Such a section spirit is always important but it proved especially so in March 2020, when the campus shut down at short notice and students had to vacate their residences and find places to live all over the country in the midst of a global pandemic. I give tremendous credit to Amy in the role that she played in keeping students' spirits up in the midst of that turmoil, which allowed them all to pivot effectively to remote learning without hardly missing a beat. The personal skills she displayed during that time say a lot about her potential as team player and successful lawyer.

Amy has a solid academic record in law school. The dominance of grades of "Pass" on Amy's transcript must be placed in their proper perspective. At Harvard Law School, our classes are generally subject to a grading curve that is very strict considering the high quality of our student body and highly demanding admissions criteria. In those classes, the vast majority of students all receive the same grade of Pass, including for exams that demonstrate a mastery of the course material and that would receive high grades of distinction at other law schools where I have taught. The bottom line is that there is nothing remotely "average" about a Harvard Law student. That is why I never hesitate to hire as my research assistant students who have received a Pass in my class or to recommend them for demanding jobs. And it is why I am never surprised when I later hear from judges and other employers how terrific the students are in their jobs.

Amy, like most everyone in my first Torts class, received a Pass grade in the Fall of 2019. She received an Honors grade in my advanced legal research and writing seminar this past spring. There were about two dozen students in the class and we met for two hours each week to discuss decided and pending cases in the Supreme Court. Amy came to each class well prepared and was as valuable and enthusiastic member of the classroom discussions as she had been during first year Torts. The seminar is not graded based on a written exam but on classroom participation and the quality of a student's written work. Students can choose whether to write a series of shorter papers or one long paper. The high quality of Amy's five written submissions, coupled with the high quality of her classroom participation, easily earned the Honors grade.

I am a fan of Amy's and am confident she will be an excellent judicial clerk. Please consider her application closely and do not hesitate to contact me if you have any questions.

Best wishes,

Richard J. Lazarus

Richard Lazarus - lazarus@law.harvard.edu - 617-495-8015

Writing Sample

Drafted December 2021

The attached is a final paper for a Class Actions Course. The assignment was to write an opinion for court in the Third Circuit, given a hypothetical class action settlement document. We were limited to using the cases discussed in the class and asked to address all possible issues arising out of Federal Rule of Civil Procedure 23. All writing and reasoning are my own.

Opinion

This matter arises from Plaintiffs Adrienne Alpha, Blake Beta, Gary Gamma, Dakota Delta, and Edward Epsilon's class action complaint against Defendant ACME regarding misrepresenting the emission standards of its ACME Green vehicle. Under Federal Rule of Civil Procedure 23(e), these Plaintiffs now move, with consent from Defendant, for preliminary approval of a settlement, conditional class certification, and the scheduling of a final fairness hearing. Plaintiffs' motion is denied.

Background

Plaintiffs allege injury as a result of buying a car at an inflated price resulting from ACME's misrepresentation of the ACME Green's emissions standards. AMCE advertised the Green as a car with low emission standards, when in fact it has the highest emissions on the car market. ACME achieved this standard by incorporating software which artificially lowered the car's emissions standards. After a whistleblower revealed the issues with the software and emissions the market value of a new ACME Green dropped from $80,000 to $30,000.

After a hearing regarding class certification but before any ruling by this Court, Plaintiffs and Defendants have created a settlement document providing relief to a nationwide class to achieve "global peace" through a "claims made" settlement in which ACME denies making any misrepresentations.

Discussion

"Before approving a class settlement agreement, a district court must first determine whether the requirements for class certification in Rule 23(a) and (b) have been satisfied." *In Re American Intern. Group, Inc. Securities*, 689 F.3d 229, 238 (2d Cir. 2012). The focus of this analysis is on ''questions that preexist any settlement,'' and not on whether all class members have ''a common interest in a fair compromise'' of their claims. *In Re AIG*, 689 F.3d at 240 (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). "A district court need not inquire whether the case, if tried, would present

intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial. But other specifications of the Rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context." *Amchem*, 521 U.S. at 620.

I. The Current Settlement Class Fails 23(a)(4)'s Adequacy's Requirements

"Under the adequacy requirement of Rule 23(a)(4), a district court may certify a class only if the class representative 'will fairly and adequately protect the interests of the class.'" *Sharp Farms v. Speaks*, 917 F.3d 276, 295 (4th Cir. 2019). "The adequacy inquiry ... serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem*, 521 U.S. at 625.

In their briefs opposing certification of the class, Defendants noted that the Plaintiffs erred in including members within a single class that have a conflict of interest. "For a conflict of interest to defeat the adequacy requirement, 'that conflict must be fundamental. ... A conflict is not fundamental when ... all class members 'share common objectives and the same factual and legal positions [and] have the same interest in establishing the liability of [defendants].'" *Sharp Farms*, 917 F.3d at 295. Plaintiffs had included both buyers and sellers of used ACME Greens who had bought or sold their cars before August 30, 2019. The conflict between these two groups is clear—they do not have the same factual positions and the parties have opposing objectives as to who should recover premiums in damages. The class may have been able to overcome these issues had there been class representatives for both buyers and sellers of used cars. Unfortunately, it did not. As the Court noted in the hearing, there was no class representative for secondary purchasers of the ACME Green.

Now the parties propose a settlement and have preserved the same nationwide class that Defendants originally rebuffed, with no adjustments for adequacy concerns. The Court remains unconvinced. The settlement class must fairly and adequately represent all members of the class, including secondary buyers. As the Third Circuit held and the Supreme Court affirmed, "although a class action may be

certified for settlement purposes only, Rule 23(a)'s requirements must be satisfied as if the case were going to be litigated." *Amchem* 521 U.S. at 609. The settlement class does not meet this standard.

II. The Current Settlement Class Fails Commonality and Predominance Requirements

"The Third Circuit recognize[s] that Rule 23(a)(2)'s ''commonality'' requirement is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class ''predominate over'' other questions." *Amchem*, 521 U.S. at 609. "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id*. at 623.

"Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Id*. However, the predominance inquiry "calls upon courts to give careful scrutiny to the relation between common and individual questions in a case." *Tysons Food, Inc. v. PEG Bouaphakeo, et al.*, 577 U.S. 442, 453 (2016). This Court applies the *Amgen* theory of predominance, selecting the "metho[d] best suited to adjudication of the controversy fairly and efficiently." *Amgen v. Conn. Retirement Plans and Trust*, 568 U.S. 455, 460 (2013). To satisfy fairness and efficiency, the Court "must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits." *In re: Lamictal Direct Purchaser Antitrust Litigation*, 957 F.3d 184, 191 (3d Cir. 2020).

We do not believe factual disputes to be at issue here. However, central legal disputes remain. Other circuits have remanded decisions for "not sufficiently engag[ing] with . . . arguments about reliance," intent, or causation. *Langan v. Johnson & Johnson Consumer Companies, Inc.*, 897 F.3d 88, 98 (2d Cir. 2018). Here there is a significant issue between the objective standard used by half of the states and the subjective materiality standard used by the other half. The Court does not wish to impose New Jersey law on consumers who whose states prefer a different standard than its own. The Court expressed as much at the earlier hearing, referencing the *Erie* doctrine directly. The Court would have preferred the parties to have taken the suggestion of creating subclasses, which was posed at that hearing, seriously.

Unfortunately, no subclasses were created during the settlement, and a predominance issue remains. If the settlement had explicitly established its predominance theory on the issues and given a qualitative analysis, the Court would have been somewhat less concerned. However, objectors are right to be skeptical that the wisdom of the Court was not followed, and that the differences in state law should have been incorporated into the allocation scheme.

III. Possible Standing Issues Must Be Addressed

"We have an obligation to assure ourselves of litigants standing under Article III…That obligation extends to court approval or proposed class action settlements." *Frank v. Gaos*, 139 S. Ct. 1041, 1047 (2019). "Every class member must have Article III standing in order to recover individual damages." *TransUnion* 141 S. Ct. 2190, 2208 (2021). "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not" *Tyson*, 577 at 1053 (Roberts, C.J., concurring). To satisfy standing, a plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. at 338 (2016). An injury-in-fact is "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent,' not conjectural or hypothetical." *Id*. at 339. A particularized injury "must affect the plaintiff in a personal and individual way" and a concrete injury must be "*de facto*" though not necessarily tangible. *Id*.

The Court is concerned that Defendants have not given a reason for changing their opinion such that those who sold their cars before the August 30, 2019, date now suddenly appear to have standing. Though Plaintiffs must submit the settlement, the Court would like to know how the settlement class accounts for these changes, that is, whether parties accept Plaintiffs' original concept of harm or if a new theory of standing has been applied. Given the courts' increased skepticism of injured class members, explanations of standing must be provided with the definition of the settlement class.

IV. The Current Settlement Does Not Meet the Standards of Fair, Reasonable, and Adequate

"If the class satisfies the requirements of Rules 23(a) and (b), then the district court must separately evaluate whether the settlement agreement is ''fair, reasonable, and adequate'' under Rule 23(e)." *In Re AIG*, 689 F.3d at 238. Though the settlement class satisfies neither, the Court will continue to evaluate each issue with the settlement in the interest of thoroughness.

Federal Rule of Civil Procedure 23(e) provides that "[t]he claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). "The district court has a fiduciary responsibility to ensure that the settlement is fair and not a product of collusion, and that the class members' interests were represented adequately." *Sharp Farms*, 917 F.3d at 294.

In its fiduciary capacity, the Court examines many aspects of the settlement, including changes to class size, Defendants' capacity to pay, the cost of the trial, the allocation of damages, the claims process, details of how the settlement was reached, and attorney's fees. *See* Fed. R. Civ. P. 23(e)(2). Concerns abound with this particular settlement.

a. Negotiation Processes Are Unclear

Negotiations must be conducted "at arm's length." Fed. R. Civ. P. 23(e)(2)(B). Courts find settlements are most equitable to all parties involved when a mediator is included in creating a settlement. *See Sharps Farms*, 917 F.3d at 291 (in which a party argued "a strong presumption against collusion applies '[w]hen a reputable mediator . . . oversees settlement negotiations," citing 5th and 2d Circuit opinions). This decreases the likelihood of collusion and allows for a neutral third party to attest to each counsel's appropriate behavior, provided they have access to all correspondence between Plaintiffs and Defendants. *See id*. (in which a mediator did not have "all the relevant information on the collusion allegations at the time he presided over and facilitated a mediation").

In this settlement document, very little is revealed as to how the settlement came to be. What we know is that a month after the Court suggested settlement, a negotiation agreement appeared. No mediator was involved. No information is provided as to the time that was spent in these negation settlements, how many hours were spent in discussion, or whether there were multiple drafts of the settlement. The Court presumes that hours were calculated on both sides as to work done, but that is not provided here. Given the lack of information provided, the Court is wary to approve such a settlement, particularly in the context of 100 objectors. This Court requires more of a paper trail to ensure a lack of collusion on the part of both parties, ideally with a mediator if possible.

b. Differences in Damages

"The relief provided for the class must be adequate, taking into account…[that] the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(C), (D). Differences in damages can be consistent with a theory of liability. However, differences in damages here do not seem to follow either Dr. Langdell's nor Dr. Manning's theories of liability, and while the Court was satisfied with neither theory, there is no substitute reasoning provided to explain how the current damages allocations were calculated. In cases that have different theories of compensation, the Court must evaluate how these different theories are constructed within the context of equity. To do so, explanations must be provided by the Plaintiffs. In *Amchem*, Plaintiffs provided "[a]n exhaustive document exceeding 100 pages" to describe four categories of compensation. *Amchem*, 521 U.S. at 603. While this Court does not argue that the damages here are anywhere near as complicated as those discussed and eventually rejected in *Amchem*, much more explanation is necessary.

The Court is particularly confused by the significant differences in recovery regarding direct buyers who purchased their cars in different years. There is no explanation given for this—the ACME Green sold at a constant pricing both at full price and at the same discounted price across years. While the discount is not tabulated into the relief, the years owned is, at a significant rate of decreasing $5000 per year. Why

someone who bought a car December 31, 2018 deserves twice as much recovery as a person who bought their car Jan 1, 2019 is unexplained, leaving much to the imagination.

c. The Injunctive "Relief"

ACME has graciously agreed to change the name of their model to delete any reference to the word "Green." The Court is skeptical if this is relief for the Plaintiffs or the Public Relations representatives of ACME. This type of relief only serves to distance the model from a scandalous past. Any buyer who has missed the many news articles addressing the emissions issues and is unaware of the ACME Green scandal has only to look the car up on the internet or ask a sales representative of the cars emissions to prevent the assumption that the model is environmentally friendly. The relief of "Green" is meaningless and should not be calculated into attorney's fees.

d. Payments to Class Representatives

The payments to class representatives are within the bounds of what is expected in consumer class actions for their service to the Court. We do not apply careful scrutiny in this Circuit. Concerns that the class representatives are paid excessively well compared to class members seems unjust, considering that the most a class representative will recover will be $35,000, which is less than twice the ceiling of class member recovery generally.

e. The Appropriateness of the Lodestar

The Court must consider the terms of any proposed attorney's fees, including timing of payment. Fed. R. Civ. P. 23(e)(2)(C)(iii). The Court acknowledges Class Action Lawyers' imminent knowledge of class action law, however, to determine the appropriate lodestar, the court must consider the fees not only in terms of counsel's knowledge of applicable law, but also the work done, the experience of the lawyers, and the resources that have been spent on the case. The Court would have preferred to see the lodestar

calculated by the percentage-of-recovery method, particularly since this case is a "claims made" settlement as opposed to common fund settlement.

While the $3 million may very well be appropriate, more information is needed to show how the parties got to such a number. The Court would like to see the calculations, the amount of money invested, the hours worked, and any evidence deemed appropriate to show the experience of the lawyers involved. The Court is also willing to delay consideration of the lodestar until after the claims processes, which will provide a more accurate tabulation of resources spent and work done. To sum up, the Court asks Plaintiffs to show their work to ensure they are receiving fees commensurate with the risk, work, and quality of the proceedings.

f. The Ease of Processing Claims

The "method of processing class-member claims" must also be fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2)(C)(ii). The claims process here does not seem to overburden the settlement class, particularly when considered in light of the amount of relief provided. This seems both equitable to the class-members, who will likely have documentation of their purchases/sales/leases, and to ACME, who reasonably would want to ensure they are not being defrauded.

V. Conclusion

For the reasons stated above, we conclude that Plaintiffs' motion for preliminary approval of proposed class action settlement is denied.

IT IS SO ORDERED.

Date: Dec 17, 2021

/s/ Judge Amy Hayes.

Applicant Details

First Name	**John**
Middle Initial	**M**
Last Name	**Hindley**
Citizenship Status	**U. S. Citizen**
Email Address	**jhindley@law.gwu.edu**
Address	**Address** Street **2001 N. Adams Street, #730** City **Arlington** State/Territory **Virginia** Zip **22201** Country **United States**
Contact Phone Number	**4018291104**

Applicant Education

BA/BS From	**Providence College**
Date of BA/BS	**May 2017**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**May 17, 2020**
Class Rank	**15%**
Law Review/Journal	**Yes**
Journal(s)	**The George Washington Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Van Vleck Moot Court Competition** **1L Internal Moot Court Competition**

Bar Admission

Admission(s)	**District of Columbia**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Lawrence, Kupers
kupdog1@gmail.com
Tutt, Andrew
Andrew.Tutt@arnoldporter.com
202-9425242
Peterson, Todd
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(703) 768-5813

This applicant has certified that all data entered in this profile and any application documents are true and correct.

John M. Hindley
2001 N. Adams Street, Apt. 730, Arlington, VA 22201 | (401) 829-1104 | jhindley@law.gwu.edu

March 1, 2022

The Honorable Lewis J. Liman
U.S. District Court
Southern District of New York
500 Pearl Street
New York, NY 10007-1312

Dear Judge Liman:

I am writing to apply for a clerkship position in your chambers for the 2024-2025 Term. I am currently an associate at Arnold & Porter Kaye Scholer LLP in its general litigation group. I graduated from The George Washington University Law School in May 2020 and I am a member of the District of Columbia Bar.

As part of my career trajectory, I hope to serve as a federal prosecutor. I began my career at Arnold & Porter in order to gain familiarity with criminal and civil investigations and trial preparation through a private sector lens. Serving as a clerk is a critical step towards my career goal. It would be an invaluable opportunity to not only improve my writing and learn about various substantive and procedural matters, but also to observe the advocacy skills of attorneys who argue before your court, particularly in criminal matters. My experience at Arnold & Porter has prepared me to be a supportive member of your chambers who can effectively collaborate with you and the other clerks, quickly integrate feedback in my writing and research, and help manage your overall docket. In addition, I consider my interpersonal skills to be a particular strength, allowing me to professionally and articulately communicate with others both inside and outside of your chambers.

I am enclosing a resume, two transcripts, and a writing sample. Attached also are recommendation letters written by Professor Todd Peterson, Mr. Larry Kupers, and Mr. Andrew Tutt.

Please let me know if I can provide any additional information. I can be reached by phone at (401) 829-1104 or by email at jhindley@law.gwu.edu. Thank you very much for considering my application.

Sincerely,
John Hindley

John M. Hindley

2001 N. Adams Street, Apt. 730, Arlington, VA 22201 | (401) 829-1104 | jhindley@law.gwu.edu

WORK EXPERIENCE

Arnold & Porter Kaye Scholer LLP, Washington, D.C.
Associate, *General Litigation Group*, Jan. 2021–Present; Summer Associate, May-July 2019

Products Liability - Handle matters concerning pre-trial discovery on a state-level products liability team. Draft discovery dispute letters regarding deficiencies in the opposing party's discovery. Draft memorandum analyzing the state-law claims made against the client and the likelihood of recovery. Observe proceedings before a special master tasked with resolving discovery disputes. Serve as the state-team liaison updating other state teams of discovery developments. Draft summary judgment motions against government entities in federal MDL.

Commercial - Draft memorandum describing how the client in an accounting malpractice case can minimize its damages under state-law comparative liability or successive liability theories and whether the plaintiff can claim privilege during discovery. Conduct cite, edit, and substantiation checks of motions and appellate briefs.

Investigations - Manage document production for an investigation into alleged violations of the Anti-Kickback Statute. Draft memoranda and review documents in a FINRA investigation of a broker-dealer firm. Draft memorandum for client on the limits to which the government can recover for alleged violations of the FCA. Prepare client for a witness interview before Special Counsel John Durham. Represent a former chairman of a Chinese-based company in an SEC investigation.

Appellate/Pro Bono- Brief section in a Sixth Circuit criminal appeal arguing that the client's conviction does not qualify as a crime of violence. Draft filings, manage defensive discovery, and prepare expert witnesses in voting rights lawsuits. Counsel client who was denied unemployment benefits from the Virginia Employment Commission in an administrative appeal. Draft briefing defending the validity and enforceability of subpoenas issued by the January 6th Committee.

Advisory Writing - Draft client advisories for the Securities Enforcement, White Collar, and FCA groups.

Rising for Justice, Washington, D.C.
Student Attorney, Aug.–Dec. 2019
Represented a low-income client who was charged with a misdemeanor. Drafted and submitted motions to, and argued them before, the Superior Court for the District of Columbia. Prepared for a bench trial, interviewed witnesses, and gathered evidence for client's criminal defense.

Todd D. Peterson, Carville Dickinson Benson Research Professor, Washington, D.C.
Research Assistant, Nov. 2018–May 2020

Conducted substantive legal research on personal jurisdiction and separation-of-powers issues

U.S. District Court, District of Columbia, Chambers of Judge Amy Berman Jackson, Washington, D.C.
Judicial Intern, May–July 2018

U.S. Attorney's Office for the District of Columbia, Washington, D.C.
Law Clerk, Jan.–Apr. 2019

U.S. Department of Justice, Criminal Division, Fraud Section, Washington, D.C.
Fall Intern, Sept.–Nov. 2018

EDUCATION

The George Washington University Law School, Washington, D.C.
Juris Doctor *with Honors*, GPA: 3.722, May 2020

- *George Washington Scholar* (Top 15% of the class)
- *The George Washington Law Review* (Articles Editor, Vol. 88); ADR Honor Board (Member), Dean's Recognition for Professional Development, Elected Member of the S.B.A. Senate (2019–20)
- Publication: *Time is Not the Enemy*, 88 GEO. WASH. L. REV. 1193 (2020) (Administrative Law Edition)

Providence College, Providence, R.I.
Bachelor of Arts, *Summa Cum Laude*, Political Science, Economics, May 2017

- Dean's List (every semester), Pi Sigma Alpha (Political Science), Omicron Delta Epsilon (Economics)
- Class President (2013–14), Student Representative (Strategic Planning Committee, Academic Integrity Board, Centennial Celebration Committee), Retreat Leader
- Publication: *Let's Offer Alternatives to Payday Loans*, PROVIDENCE J. (Dec. 12, 2015)

INTERESTS

Cooking my grandmother's recipes, golfing, reading biographies, and going on morning runs.

Bar Admission: District of Columbia (January 2021)

John Hindley
The George Washington University Law School
Cumulative GPA: 3.722

Fall 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Contracts I	Gabaldon	A	3	
Legal Research and Writing	Guthrie	A-	2	
Civil Procedure	Peterson	B+	3	
Torts	Schoenbaum	A-	4	
Criminal Law	Pustilnik	A+	3	

George Washington Scholar (top 1-15% of the class)

Spring 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Introduction to Advocacy	Guthrie	B+	2	
Property	Kieff	A-	4	
Constitutional Law I	Fontana	A	3	
Contracts II	L. Fairfax	A	3	
Civil Procedure II	Siegel	B+	3	

George Washington Scholar (top 1-15% of the class)
Deans Recognition for Professional Development

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Law Review	Clark	CR	1	
Government Lawyering	Goldsmith	A-	2	
Corporations	L. Fairfax	A	4	
Field Placement	Tillipman	CR	2	
Evidence	Braman	A-	3	
College of Trial Advocacy	Cohen	B	3	

George Washington Scholar (top 1-15% of the class)

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Administrative Law	Hammond	A-	3	
Advanced Field Placement	Johnson	CE	0	
Complex Litigation	Transgrud	CR	3	
Criminal Procedure	Drinan	B+	3	
Law Review	Clark	CR	1	
Professional Responsibility/ Ethics	Lee	A-	2	
Field Placement	Tillipman	CR	2	

George Washington Scholar (top 1-15% of the class)

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Moot Court-Van Vleck	Johnson	CR	1	Internal Moot Court Competition
Reading Group	Fontana	CR	1	Constitutional Issues in the Trump Administration
Law Review	Clark	CR	1	
Independent Legal Writing	Pierce	A+	1	
White Collar Crime	Eliason	A-	3	
Law Students in Court/ Criminal Division	Johnson	A	6	Legal Clinic

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Adjudicatory Criminal Procedure	R. Fairfax	CR	3	
Separation of Powers	Peterson	CR	3	
Federal Courts	Clark	CR	4	
International Money Laundering	Laisch and Smith	CR	3	
Law Review	Clark	CR	1	

For the Spring 2020 semester, all courses are to be assigned CR/NC marks, with CR corresponding to C- or better had the work been letter-graded, and NC corresponding to lower than C- had the work been letter-graded. This policy is mandatory for all Spring 2020 courses and applies regardless of when the work for each course was completed.

The Bulletin provides that required courses, experiential courses, and courses to fulfill the writing requirement must be taken for letter grades. (E.g., Bull. at 12.) This requirement is waived for Spring 2020. However, students receiving an NC in a required course must still retake that course. (See Bull. at 15.)
The Bulletin provides that J.D. students must receive a B- or better on their legal writing requirement. (Bull. at 13.) For Spring 2020 only, the required mark is a CR which is a C- or better. However, instructors must ensure that the work is based on sound legal research, and meets the length, footnotes, and citation requirements.

The Bulletin provides that U.S. graduate students must receive a B+ or better on their written work requirement. (E.g., Bull. at 27.) For Spring 2020 only, the required mark is a CR which is a C- or better. However, instructors must ensure that the other written work requirements relating to length, footnotes, and legal citation rules, are met.

The Bulletin provides that typically, students who drop courses after the Add/Drop period but prior to eleven weeks of study receive a mark of NC on their transcripts (Bull. at 17-18, 42.) For Spring 2020 only, any such drops will be indicated on the student's transcript with a "W" to avoid the misperception that the student took the course but failed to meet the criteria meriting a mark of CR. The eleven-week limitation remains in effect for Spring 2020.
The Bulletin establishes limits on the number of hours J.D. students may choose to take on a CR/NC basis. (E.g., Bull. at 18.) Any such elections made in Spring 2020 shall not count toward those limits, even if the elections were made prior to the announcement of the mandatory CR/NC policy. Nor shall any CR/NC marks received in Spring 2020 count toward those limits.
Similarly, the Bulletin's minimum number of letter-graded hours for J.D. and transfer students (Bull. at 11) shall be adjusted so that course hours taken in Spring 2020 are subtracted from those values.

The Bulletin provides that graduate students may not elect to take graded courses for CR/NC. (Bull. at 40.) This provision is waived for Spring 2020.

The Bulletin provides that students who fail to take an exam are awarded a grade of F unless excused by the Dean of Students or permitted to drop the course. (Bull. at 18.) For Spring 2020, failure to take an exam without excuse or permission to drop will result in a mark of NC. The provisions for graduate

students are to be modified in the same fashion. (Bull. at 41.)
The Bulletin provides that where coursework is graded by methods other than exams and a student receives an extended deadline as contemplated in the Bulletin, a student who fails to complete the coursework is awarded an F. (Bull. at 19.) For Spring 2020, failure to complete the coursework under these circumstances will result in a mark of NC. The provisions for graduate students are to be modified in the same fashion. (Bull. at 41-42.)
The Bulletin provides that J.D. students receiving more than two NCs over the course of study are excluded from further study unless they petition, and receive permission from, the Academic Scholarship Committee (Bull. at 20.) This rule remains in effect, as does the single-NC rule for graduate students. (Bull. at 27.)

The Bulletin provides that students taking courses at other GW schools for credit toward their J.D. must earn a mark of at least B- to receive corresponding CR in the Law School. (Bull. at 22, 24.) For Spring 2020, such students must meet the criteria for CR applicable in that other school's academic program for Spring 2020. The same modified policy applies to graduate students taking non-Law School courses toward their LLM degrees (Bull. at 39), and MSL degrees (Bull. at 42).

Grading System Description

Grading System and Academic Recognition Policy

The George Washington University Law School provides letter grades (A+, A, A-, B+, B,B-, C+, C, C-, D, F) and calculates grade point average on a 4.0 scale (A+ = 4.33).

The majority of courses are graded on a letter-grade basis, but for a small number of courses, primarily those that are clinical or skills-oriented, the grade of CR (Credit) or NC (No Credit) is given or the following grading scale is used: H (Honors), P (Pass), LP (Low Pass), and NC (No Credit). For Honors, a student must do work of excellent quality, and no more than 25 percent of the class may earn this grade.

Students of The George Washington University Law School are not supplied with individual class rankings. However, in lieu of specific rankings, students' relative academic accomplishments are represented through two scholar designations.

Students in the top 1 % - 15% of the class (based on cumulative GPA at the end of each semester) are designated "George Washington Scholars," and students in the top 16% - 35% of the class (based on cumulative GPA at the end of each semester) are designated "Thurgood Marshall Scholars."

An exception to this academic recognition policy has been made for George Washington Scholars and Thurgood Marshall Scholars who are applying for judicial clerkships using OSCAR. Those students are allowed to obtain and disclose their rankings in their OSCAR profiles within the more specific percentile cutoffs listed in OSCAR (i.e. top 5, 10, 15, 20, 25, 30, 33 and 50%). All other students can simply denote "I am not ranked."

Once students graduate, their transcripts typically reflect their final class rank. In addition students may graduate "With Highest Honors" (top 3 %), "With High Honors" (top 10 %) and "With Honors" (top 40%)."

John Hindley
Providence College
Cumulative GPA: 3.87

Fall 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Politics		A	3	
International Relations		A-	3	
Development of Western Civilization		A-	4	
Writing Seminar		A	3	
Development of Western Civilization Seminar		NG	0	

Dean's List
Good Standing

Spring 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Empirical Political Analysis		B+	3	
Math Business Analysis II		A	3	
Development of Western Civilization Seminar		NG	0	
Development of Western Civilization		A-	4	
Comparative Politics		A	3	
Principles of Economics - Macro		A	3	

Dean's List
Good Standing

Fall 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Logic		B	3	
Development of Western Civilization		A-	4	
Public Administration		A	3	
Introduction to Statistics		A-	3	
Development of Western Civilization Seminar		NG	0	
Principles of Economics - Micro		A	3	

Dean's List
Good Standing

Spring 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Development of Western Civilization Colloquium Seminar		NG	0	

Biblical Theology	A	3
Economics of Developing Nations	A	3
Development of Western Civilization Colloquium	A	4
American Public Policy	A	3
Microeconomic Analysis	A-	3

Dean's List
Good Standing

Summer 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Ethics, Moral Leadership, and the Common Good		3	B+	

Good Standing

Fall 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Democratic Theory		A	3	
Intro Econometrics with Lab		A	4	
Political Science Internship		A	3	
Macroeconomic Analysis		A	3	
Catholic Social Thought		A	3	
Catholic Imagination in American Film		A	3	

Dean's List
Good Standing

Spring 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Washington Semester/ American Gov't and Politics Internship		A	4	
Washington Semester/ American Gov't and Politics Seminar I		A	4	
Washington Semester/ American Gov't and Politics Research Project		A	4	
Washington Semester/ American Gov't and Politics II		A	4	

Dean's List
Good Standing

Fall 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Economics Senior Capstone		A	3	
Public Finance		A-	3	
Independent Study		A	3	

The African World View	A	3

Good Standing
Dean's List

Spring 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Capstone: American Political Dysfunction		A	3	
Health Economics		A	3	
Labor Economics		A	3	
Environmental Biology		A	3	

Dean's List
Good Standing
Omicron Delta Epsilon
Pi Sigma Alpha
Summa Cum Laude
Class Rank: 35 out of 950

Grading System Description

The combined results of examinations, assignments, classroom participation, and general evidence of regular and consistent application determine a student's standing in each subject. In grading, it is the responsibility of each member of the teaching faculty to give due weight not only to the degree of mastery of the subject matter manifested by the student in examination, but likewise to the degree of originality, correctness in expression, and conformity with approved forms for written assignments. The quality of work is indicated by the grading system.

Quality Grade Points

Quality grade points determine the student's grade point average (GPA). They are a measure of the quality of course work completed, while credit hours are a measure of each course's weighted value. For example, a student earns the following grades: 3-credit "A", 3-credit "B", 3-credit "C", and 5-credit "B". The quality points are computed as 3-credit "A" (12 quality points), 3-credit "B" (9), 3-credit "C" (6), and 5-credit "B" (15). The quality point average is 42 (total quality points) divided by 14 (total averaged credit hours), which equals 3.00. (Note: the "cumulative" quality point average or "cumulative" grade point average includes all courses in the student's academic record.) See Grade/Quality Points Chart for specific details regarding the number of quality points assigned for specific grades.

Grade/Quality Points Chart

Standard Honors Courses
A Superior 4.00 points per each credit hour completed 4.00 points per each credit hour completed
A- 3.67 points per each credit hour completed 3.84 points per each credit hour completed
B+ Very Good 3.33 points per each credit hour completed 3.50 points per each credit hour completed
B Good 3.00 points per each credit hour completed 3.17 points per each credit hour completed
B- 2.67 points per each credit hour completed 2.84 points per each credit hour completed
C+ Above Average 2.33 points per each credit hour completed 2.50 points per each credit hour completed
C Average 2.00 points per each credit hour completed 2.17 points per each credit hour completed
C- 1.67 points per each credit hour completed 1.84 points per each credit hour completed
D+ Passing 1.33 points per each credit hour completed 1.50 points per each credit hour completed
D Low Passing 1.00 points per each credit hour completed 1.17 points per each credit hour completed
D- 0.67 points per each credit hour completed 0.84 points per each credit hour completed
F Failure 0.00 points per each credit hour completed

P (Pass) Passing in Pass/Fail Course; this grade is not computed in the GPA.
AU (Audit) Student attends class in non-credit capacity; this grade is not computed in the GPA.
I (Incomplete) Incomplete; becomes "NF" if not completed by mid-semester date of the following semester.
LB (Lab Course) Non-credit lab courses receive an auto-grade of "LB."
NF (Not Finished) Course not finished within required time; this grade earns 0.00 quality points per credit hour.
NG (Not Graded) Auto-grade of "NG" given to courses in which the co-requisite course is graded.
NM (No Mark) Instructor has not submitted grade; becomes "NF" if not resolved by mid-semester date of the following semester.
WD (Withdrawal) Approved withdrawal from a course; this grade is not computed in the GPA.

March 01, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

I write to recommend John Hindley as an outstanding candidate for a clerkship position. John was one of the students I supervised when I worked for the nonprofit, Rising for Justice (formerly DC Law Students in Court), as the Director of the Criminal Division. Rising for Justice operates a criminal defense clinic for DC law students.

John took part in our Criminal Defense Clinic during the Spring semester of 2019. As his supervisor, I worked very closely with him. Our clinic is rigorous and demanding. Each student becomes the lead attorney for an indigent client facing one or more misdemeanor charges in D.C. Superior Court. At the beginning of the semester, our students attend an intensive week of seminars on client-centered representation, investigation of a criminal case, relevant substantive law, and trial skills. During the semester, our students attend weekly two-hour seminars aimed at improving their litigation skills partly through speaker presentations and partly through exercises in which the students practice the skills taught. Each student meets with his or her supervisor for at least an hour per week but typically much more, especially when the student is gearing up for a trial. As student attorneys, our students are expected to take the lead role in defending their clients.

John excelled in our program. He was assigned a challenging case on the domestic violence docket and faced a difficult client. The client was charged with simple assault, alleged to have pushed his fiancée during a dispute. The client was not cooperative, having served a prison term for drug dealing and left prison with diagnosed mental health issues. The client was wary of lawyers and met with us only at scheduled court hearings. But John was steadfast in his efforts to develop rapport with our client. John did an excellent job with the investigation of the case, directing the efforts of another student in the program who was assigned as our case investigator. John also excelled at pretrial litigation, filing several substantive motions. He has solid legal-analytical and writing skills and can be depended upon for high quality legal work.

Our client elected to go to trial. In D.C. Superior Court, the practice is for most if not all pretrial motions to be heard and adjudicated on the day set for trial. On that day, John masterfully argued the motions he had filed. He convinced the judge that evidentiary hearings were required on two of the motions filed. The trial then had to be delayed so that the government could collect its witnesses. The judge was clearly impressed with how John handled himself in the courtroom. Perhaps more importantly, a client who had been very skeptical of his legal representation to that point enthusiastically praised John for his performance and made it clear that he was extremely pleased to have John representing him.

John was one of our very best students that semester. Beyond his legal skills, he demonstrates good judgment and is mature beyond his years. I have no doubt he is heading into what will be an accomplished legal career. I recommend him without reservation.

Please feel free to contact me with any questions. My cellphone is: (202) 590-0905.

Sincerely,

Larry Kupers

Kupers Lawrence - kupdog1@gmail.com

Andrew Tutt
Senior Associate
Arnold & Porter Kaye Scholer LLP
202.942.5242
andrew.tutt@arnoldporter.com

March 01, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Re: *Letter of Recommendation for Clerkship Applicant John Hindley*

Dear Judge Liman:

I write to recommend John Hindley for a clerkship in your chambers in the strongest terms. I have had the opportunity to work with him on two federal appeals. In each, I have been impressed with his work ethic and research and writing skills. John is among the best associates I have worked with in his class at Arnold & Porter and a tremendous asset to the firm. I consider John a go-to associate for complex appellate and Supreme Court work. You should hire him.

By way of background, I am a Senior Associate in the Appellate and Supreme Court Practice Group at Arnold & Porter Kaye Scholer LLP. In that role, I focus on Supreme Court, appellate, and complex litigation. I have been lead counsel on appeals in nine of the thirteen federal courts of appeals, I have argued eight times (once en banc), and I have been counsel of record on two Supreme Court merits cases. I will be arguing Torres v. Texas Department of Public Safety, No. 20-603 (U.S.) on March 29. As a consequence of this broad spectrum of appellate work, across the range of my practice, I supervise and work with dozens of the firm's junior associates. I may work with a larger and more diverse array of Arnold & Porter's associates than many of the firm's partners.

Among the associates with whom I have worked with over the last few years, John stands out. He has distinguished himself by the quality of his work and also by his work ethic, his diligence, and his passion for the law. His capacity to learn and grow has also impressed me. I have had the opportunity to see John become a better lawyer every time we have worked together. He is also remarkably kind and upbeat.

John first worked with me when he was a summer associate. I asked him to write the first draft of the argument section of a merits brief in a pending appeal. The appeal was complex and difficult: it involved an issue over which the federal courts of appeals were (and remain) sharply divided. The appeal asked the court of appeals—which at that time had not yet weighed in—to take a side in this sharp conflict. I gave John some vague guidance about how to research the relevant issues in the case and write the arguments, but for the most part, I gave him the opportunity to research the issue himself and write the most persuasive merits arguments he could. His work was impressive. To be sure, not everything John wrote was triple-A. But when I give these assignments to summer associates sometimes I get back the equivalent of a first draft of a first draft. John vastly exceeded my expectations: he delivered a well-researched and persuasive argument section that could easily have been submitted as-is in the brief. (I know that to be true because, as part of drafting the brief, I reviewed a half-dozen briefs that had argued our position in other circuits; John's was better).

John joined the firm as an associate a year later, and I have to say that I was thrilled that he did, because I knew his quality and wanted to work with him again. Only a few months after he started up again at the firm, I had the chance. He agreed to jump in on an even-more-difficult appeal involving a very lopsided circuit conflict. The split was 4-1. We were aiming to make it 4-2. He drafted a substantial portion of the merits brief and helped with all aspects of the briefing. His work on that brief was stellar—easily as good as any work I have seen by an associate of John's level. His diligence and work ethic were also critical to preparing that brief. He aided in all aspects of its preparation, including reviewing and critiquing work by other more senior attorneys, and helping to finalize and file it.

John and I have also worked on more mundane matters together, including the preparation of labor-intensive but otherwise run-of-the-mill filings in pending multidistrict litigation. It is not the kind of work that gets your name in lights, but it is the kind of work that keeps the lights on. In executing that project, given the enormity of the task we confronted, I needed to be able to trust the associates that I was working with implicitly, because it was not physically possibly for me to flyspeck everything they did. I knew that I could count on John to deliver faultless work, and he did not disappoint.

One last comment before I wrap up this letter. I could go on for pages about why I think John has the makings of a tremendous lawyer and perhaps even a future star. But I would like to close by just talking a bit about John as a person. I have now, over my nearly ten years as an attorney, had many lawyers as colleagues. The very best have been compassionate, reserved, and unflaggingly kind. John is all of those things. He is modest and eager at every step. Thinking back to my time clerking, and the intimate environment we had—just the four clerks and the judge—I know the importance of working alongside a colleague who gets along with everyone. John gets along with everyone. I would have been thrilled to have him as a co-clerk.

In sum, as much as it pains me to say, I hope you hire John for a clerkship in your chambers. I would be glad to talk more by phone or email should you have any questions or need any further information.

Thank you for your time and attention.

Sincerely,

/s/ Andrew Tutt

Andrew T. Tutt

Andrew Tutt - Andrew.Tutt@arnoldporter.com - 202-9425242

The George Washington University Law School
2000 H Street, NW
Washington, DC 20052

March 01, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

I am delighted to write to you on behalf of John Hindley, who has applied for a clerkship position with you. John is a 2020 graduate of The George Washington University Law School. During his first semester at GW Law, he was a student in my Civil Procedure I class, which was a small section of 36 students and which included a midterm exam as well as a final exam. In addition, during his second year, John served as an upper level student advisor to the Benjamin Cardozo Inn of Court, for which I am the principal faculty advisor. Because of John's terrific work in class and with the Cardozo Inn, I asked him to be my research assistant. As a result I am very familiar with John's work and his exceptional legal abilities. Based on my knowledge of John's work in class, with the Inns of Court Program, and as my research assistant, I think that he is a superb candidate for a judicial clerkship.

John's success in law school was preceded by an outstanding undergraduate career. As a summa cum laude grad of Providence College, John looked like someone who would do well in law school, and he fulfilled the promise of his top-flight undergraduate credentials during his time at GW Law. John was an excellent student in my Civil Procedure class. John was consistently well prepared for class, and he responded exceptionally well to difficult Socratic questioning. He finished with the highest B+ grade in the class, and I would have given him an A if our rigorous mandated curve had allowed it. As it turned out, my grade was the worst grade John received that semester, and he continued to do exceptionally well academically. As a George Washington Scholar, he was in the top 1-15% of his class, and he received terrific grades from professors who are renowned for being tough graders. Given how he did in other classes, I fear I gave him far too low a grade in Civil Procedure I. John clearly has one of the best analytical minds in his class.

Equally important in my view, John really understands the importance of taking responsibility for his own professional development as a lawyer. John received the Dean's Recognition for Professional Development, which indicates that John successfully completed all of the required elements of the GW Law Foundations of Practice program. The voluntary activities that are part of this program relate to the development of a strong professional identity and the self-directed development of critical professional skills that are not typically taught in the first-year doctrinal classroom. I believe that John's inclusion in the 20% of students who completed all of the Foundations Program requirements shows that he not only was devoted to classroom work, but he also had a mature and professional understanding of the broad range of skills that lawyers need to be successful. Because John understands the importance of professional development education, he was selected to be an upper level advisor in our Inns of Court program, which is the core of the Foundations of Practice program. He was an invaluable part of the Cardozo Inn advisory team, and he was a huge asset to last year's 1L students as they worked through the program.

John's work as my research assistant was consistently outstanding. He is a tireless and effective researcher, and he writes exceptionally well. He went beyond the assignments I gave him and found important sources that I wasn't even aware that I needed but that proved to be invaluable to my own writing. I was delighted that he continued to be my research assistant through the summer and into his last year at GW Law.

Finally, I think that John is also blessed with great judgment and maturity. I also believe that he will be a wonderful colleague who will improve the working environment wherever he is employed. I have no doubt that he is headed for a stellar legal career and will be an alumnus of whom GW Law will be justly proud. I recommend him to you with the greatest enthusiasm.

Sincerely,

Todd David Peterson
Carville Dickinson Benson Research Professor and
Professor of Law

John M. Hindley

2001 N. Adams Street, Apt. 730, Arlington, VA 22201 | (401) 829-1104 | jhindley@law.gwu.edu

WRITING SAMPLE

This sample is the section of a merits brief I drafted on behalf of a pro bono client who challenged his sentence before the Sixth Circuit Court of Appeals. Members of Arnold & Porter Kaye Scholer LLP collaborated to draft the entire brief. Initially, the client proceeded *pro se* and filed a motion to vacate, set aside, or correct his conviction and sentence under 28 U.S.C. § 2255. The district court denied the client's motion. The client filed a timely appeal *pro se*. In the end, after securing representation, the Sixth Circuit granted a certificate of appealability ("COA") on two issues. Relevant here, the court granted a COA on whether the client's attempted Hobbs Act robbery conviction still qualifies as a "crime of violence" under the "elements" clause of 18 U.S.C. § 924(c)(3)(A) in light of *United States v. Davis*, 139 S. Ct. 2319 (2019) which invalidated the "residual" clause. This sample is my original draft which contains light edits.

Please let me know if you would like additional writing samples.

I. ATTEMPTED HOBBS ACT ROBBERY IS NOT A CRIME OF VIOLENCE

Mr. Doe does not challenge his conviction for attempted Hobbs Act robbery. He challenges only his separate 10-year sentence under § 924(j), which depends on the purely legal conclusion that his attempted Hobbs Act robbery conviction categorically qualifies as a "crime of violence," under 18 U.S.C. § 924(c)(3). That conclusion is wrong as a matter of law, and it must be reversed.

Accordingly, this section explains (A) what the categorical approach entails and why it applies here; (B) why the categorical approach dictates that attempted Hobbs Act robbery is not a crime of violence; and (C) why courts reaching the opposite conclusion have eschewed the categorical approach.

A. *Davis* Fundamentally Altered Federal Law and Requires the Application of the Categorical Approach Here.

Davis "abrogated controlling Sixth Circuit law" regarding the categorization of crimes of violence under 18 U.S.C. § 924(c). *United States v. Starks*, No. 3:20-cv-00311, 2021 WL 351995 at *2 (M.D. Tenn. Feb. 2, 2021) (citation source omitted). Prior to *Davis*, the Government had two ways to establish that an offense was a "crime of violence" under § 924(c)(3): (1) under the "elements" clause, § 924(c)(3)(A), which requires a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another"; or (2) under the "residual" clause, § 924(c)(3)(B), which requires a felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

In *Davis*, the petitioners were charged with multiple counts of Hobbs Act robbery and one count of conspiracy to commit Hobbs Act robbery. *Davis*, 139 S. Ct. at 2324. In addition, the government charged the petitioners in *Davis* under 18 U.S.C. § 924(c) which authorizes an increase

in a defendant's sentence for using or carrying a firearm "during and in relation to," or possessing a firearm "in furtherance of," any federal "crime of violence or drug trafficking crime." *Id*. The defendants were convicted of two separate § 924(c) charges. *Id.* at 2324-25. The issue before the Supreme Court was whether the residual clause defining "crime of violence" was constitutionally permissible. *See id.* at 2323-34. The Supreme Court struck the residual clause holding that the clause was "unconstitutionally vague" in violation of the Due Process Clause. *Id.* at 2336.

The Court's holding followed a line of cases in which the Court applied the vagueness doctrine to sentencing provisions. In *Johnson v. United States,* the Court struck down the residual clause of the Armed Career Criminal Act (ACCA). 576 U.S. 591, 606 (2015) ("*Johnson II*"). There, the statute defined "violent felony" as an offenses that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(3)(2)(B)(ii). The Court found the clause to be impermissibly vague for two reasons: it required the courts to focus on (1) a hypothetical "ordinary case" of a predicate statute's violation, rather than on actual conduct or statutory elements, and (2) the inherent uncertainty regarding the amount of risk required to qualify an offense as a crime of violence. *Id.* at 597-98. The Court found this inquiry to be too broad and arbitrary to satisfy the demands of due process. *Id.* at 598. Then, in *Sessions v. Dimaya*, the Court invalidated the residual clause of 18 U.S.C. § 16(b) under the Immigration and Nationality Act (INA). 138 S. Ct. 1204, 1222 (2018). Similar to § 924(c), section 16 had an elements and residual clause. The provision also required courts to contemplate the "ordinary case" of the defendant's offense and the risk imposed by that offense. 138 S. Ct. at 1216. The striking of the residual clause in *Dimaya* was a "straightforward" application of *Johnson* to the INA. *Id.* at 1213.

The holding in *Davis* was similarly a "straightforward" application of *Johnson* and *Dimaya* because the residual clause in § 924(c) had the same constitutional defects. As a result, to secure

the enhanced penalty, the government must prove that the defendant committed a "crime of violence" under the elements clause. This requires the application of the categorical approach in terms of how the law defines the offense. *See Davis*, 139 S. Ct. at 2334-35; *Johnson II*, 576 U.S. at 596.

In determining whether an offense qualifies as a crime of violence under § 924(c)'s elements clause, a court must use the categorical approach, under which the court determines whether the statutory elements of the offense necessarily require the use, attempted use, or threatened use of physical force. The Supreme Court has held that this methodology requires courts to assess whether the crime qualifies as a violent felony "in terms of how the law defines the offense" without examining the particular facts of a defendant's conviction. *Johnson II*, 576 U.S. at 596 (quoting *Begay v. United States*, 553 U.S. 137, 141 (2008)); *see United States v. Camp*, 903 F.3d 594, 599 (6th Cir. 2018) ("Under our caselaw . . . we are to apply the categorical approach as set out and repeatedly reaffirmed by the Supreme Court."). In other words, the court looks *only* to the statutory definition or elements of the statute of conviction and not to the actual facts of the case. *See Descamps v. United States*, 570 U.S. 254, 261 (2013); *United States v. Johnson*, 933 F.3d 540, 543 (6th Cir. 2019). Moreover, under the approach, courts "assume that the defendant's conduct rested on nothing more than the least of the acts criminalized" for conviction. *Id.*

If, based on the most innocent conduct, the defendant "*must have* used, attempted to use, or threatened to use physical force" in order to complete a particular felony, then the defendant committed a crime of violence. *United States v. Burris*, 912 F.3d 386, 392 (6th Cir. 2019). Otherwise, the conviction does not qualify as a crime of violence and the sentencing does not stand. *Id.* The physical force required for a crime of violence is "strong physical force," which is

"capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) (*Johnson I*).

A. Under a Straightforward Application of the "Categorical Approach," *Attempted* Hobbs Act Robbery Does not Contain, as an Element, Actual, Attempted, or Threatened Use of Force.

In criminal law, there is a fundamental distinction between completed crimes (i.e., robbery), and inchoate crimes that do not require a substantive offense to sustain a conviction (i.e., attempted robbery or conspiracy to commit robbery). *See, e.g.*, *United States v. Robinson*, 547 F.3d 632, 638 (6th Cir. 2008) ("[C]onspiracy is an inchoate offense that needs no substantive offense for its completion."). Although inchoate crimes can carry the same sentence as their substantive counterparts, the black-letter elements of each crime is distinct and must be analyzed separately under the categorical approach.

The Hobbs Act statute provides that:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by *robbery* or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a) (emphasis added). For purposes of the Hobbs Act, "[t]he term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property . . . ." *Id.* (b)(1). In essence, the elements of the *substantive* crime of Hobbs Act robbery requires the (1) taking of property (2) knowingly or willfully, (3) through a robbery, i.e., an unlawful taking (4) "by means of actual or threatened force, or violence, or fear of injury," (5) that affects interstate commerce.

Attempted Hobbs Act robbery, on the other hand, are distinct. For attempted Hobbs Act robbery, the government has to prove that (1) the defendant intended to commit the Hobbs Act robbery, and that (2) the defendant took a "substantial step" towards the commission of the robbery. *See United States v. Wesley*, 417 F.3d 612, 618 (6th Cir. 2005). The intent element requires the "specific intent" to complete the acts constituting the offense. *United States v. Calloway*, 116 F.3d 1129, 1135-36 (6th Cir. 1997). The "substantial step" merely requires the jury to find that the defendant's objective acts "mark [the] defendant's conduct as criminal in nature." *United States v. Blinderbeck*, 163 F.3d 971, 975 (6th Cir. 1999); *United States v. Levit*, 39 F. App'x 97, 104 (6th Cir. 2002) (attempt crimes can be satisfied by examining the "entire range of a defendant's conduct, legal and otherwise.").

Unlike its substantive crime counterpart, attempted Hobbs Act robbery does not require proof that a defendant used force, much less violent force. As this court has previously explained, the term "attempt" ought to be construed in a "broad and all-inclusive manner." *United States v. Reeves*, 794 F.2d 1101, 1103 (6th Cir.), *cert. denied*, 479 U.S. 963 (1986). As a result, at a minimum, attempted Hobbs Act robbery can be completed through an *attempted* threat of violence. For instance, the crime can be accomplished by passing a threatening note to a store cashier. *United States v. Taylor*, 979 F.3d 203, 209 (4th Cir. 2020). A defendant could also case a store that he intends to rob, discuss his plans with conspirators, and buy weapons for the job in order to be found guilty of the offense. *Id.*; *see also United States v. Dominguez*, 954 F.3d 1251, 1263-64 (9th Cir. 2020) (Nguyen, J., dissenting).

These examples are not merely hypothetical. In fact, federal appeals courts have regularly sustained convictions for attempted Hobbs Act robbery in which violent force never came into the equation. Below is a sampling of such cases:

- A man who serves as a lookout to a robbery can be guilty of attempted Hobbs Act Robbery. *See United States v. Walker*, 990 F.3d 316, 319 (3d Cir. 2021).

- Defendants who planned a robbery of a diamond merchant, secured a getaway van, traveled across state lines, but were arrested before the robbery and were found to be in possession of gloves, a pry bar, and hoods to disguise their looks have been found guilty. *See United States v. Wrobel*, 81 F.3d 450, 453055 (7th Cir. 2016); *see also United States v. Gonzalez*, 441 F. App'x 31, 36 (2d Cir. 2011).

- A defendant and "the co-conspirators [] assembled a team, finalized the robbery plan, conducted surveillance on the truck, procured two handguns and all other supplies called for in the plan," filled up gas cans for the drive, and arrived on location of the would-be crime faced criminal liability. *See United States v. Muratovic*, 719 F.3d 809, 816 (7th Cir. 2013); *see also United States v. Villegas*, 655 F.3d 662, 68-69 (7th Cir. 2011)

- A defendant who was arrested before arriving to a planned robbery of a cocaine stash house was found guilty. *See United States v. Holland*, 503 F. App'x 737, 743 (11th Cir. 2013)

At no point in the real-life examples above did the defendants "use" violent force. Rather, the defendants merely stood as the look out, planned the robbery, or prepared for the crime. Nor did the defendants above "attempt" to use violent force because none of the defendants were alleged to have intended to use actual violent force. In fact, the defendants in the above cases never "threatened the use" of violent force given that none of them had an opportunity to do so.

A number of courts have concurred with the proposition that attempted Hobbs Act Robbery is not a crime of violence because the offense does not require, as an element, the "actual, attempted, or threatened use of force." For example, the Fourth Circuit in *Taylor* recognized that attempted Hobbs Act robbery can be completed through "nonviolent substantial steps toward threatening to use physical force" under a "straightforward" application of the categorical approach. 979 F.3d at 208-09. A host of lower courts have come to the same conclusion that the attempt offense does not *necessarily* require, as an element, the use or threatened use of force. *See, e.g.*, *Starks*, 2021 WL 351995 at *8; *United States v. Halliday*, No. 3:17-cr-00267 (JAM), 2021

WL 26095 at *2 (D. Conn. Jan. 4, 2021); *United States v, Eccleston*, No. CIV 19-1201 JB\CG, 2020 WL 6392821 at *49 (D.N.M. Nov. 2, 2020); *Pangelinan v. United States*, Case No. 1:19-cv-00015, 2020 WL 1858403 at *8 (D.N.M.I. Apr. 10, 2020); *see also Dominguez*, 954 F.3d at 1263 (Nguyen, J., dissenting in part); *United States v. St. Hubert*, 918 F.3d 1174, 1212 (11th Cir. 2019) (*St. Hubert II*) (Pryor, J., dissenting from the denial of rehearing en banc).

B. Courts Reaching the Opposite Result do so Using Inconsistent and Illogical Reasoning

The court of appeals that have taken the opposite position that attempted Hobbs Act robbery is not a crime of violence fall into two categories: (1) courts that conclude that the specific intent required for attempt to commit a crime of violence makes the attempt offense a crime of violence and (2) courts that reason that, because the word "attempt" is in § 924(c), the attempt to complete a crime of violence is a crime of violence. Both are equally unpersuasive and wrong as a matter of law because these courts fail to apply the categorical approach.

1. Courts Fail to Apply the Categorical Approach When they Equate Specific Intent with Attempt.

Without distinguishing the two crimes, courts have concluded that because *substantive* Hobbs Act robbery is a crime of violence then *attempted* Hobbs Act robbery is also a crime of violence. *Dominguez*, 954 F.3d at 1261-62; *St. United States v. Hubert*, 909 F.3d 335, 351 (11th Cir. 2018) (quoting *Hill v. United States*, 877 F.3d 717, 719 (7th Cir. 2017)) (same); *United States v. Ingram*, 947 F.3d 1021, 1026 (7th Cir. 2020) (same). This is because to be guilty of attempt, the "defendant must intend to commit every element of the completed crime" of Hobbs Act robbery which includes "the commission or threat of physical violence." *Dominguez*, 954 F.3d at 1255, 1261; *see St. Hubert*, 909 F.3d at 353; *Ingram*, 947 F.3d at 1026. As a result, because there is the specific intent to commit all the elements of substantive Hobbs Act robbery, the attempt to commit the offense includes violence as an element. *Dominguez*, 954 F.3d at 1261-62; *St. Hubert*,

909 F.3d at 352; *Ingram*, 947 F.3d at 1026. According to these courts, the defendant who satisfies the intent and substantial step element of an attempt offense has attempted a violent offense that is uncompleted. *Dominguez*, 954 F.3d at 1262.

The reasoning above does not apply the categorical approach as directed by the Supreme Court in *Johnson* and *Davis*. Rather than apply the categorical approach, these courts "rest their conclusion on a rule of their own creation." *Taylor*, 979 F.3d at 208; s*ee Dominguiez*, 954 F.3d at 1264 (Nguyen, J., dissenting). By holding that that the attempt to commit the underlying crime should be treated as an attempt to commit every element of crime, the courts make a conclusion that does not "follow as a matter of law or logic." *Id.* This is because the majorities in the above courts conflate *attempt* with *intent*. *Id.*; *St. Hubert II*, 918 F.3d at 1212 (J. Pryor, J., dissenting from denial of rehearing en banc). "*Intending* to commit each element of a crime involving the use of force simply is not the same as *attempting* to commit each element of that crime." *Id.* What is required under the categorical approach is to "compare the *acts* proscribed by an underlying crime to the violent *acts* enumerated in § 924(c)(3)(A)." *Dominguez*, F.3d at 1265 (Nguyen, J., dissenting) (emphasis in original).

As explained above, completed Hobbs Act robbery has distinct elements from attempted Hobbs Act robbery. *See supra* pp. __-__. Attempt crimes require the (1) specific intent to commit the offense and (2) a substantial step towards the commission of the offense. *Wesley*, 417 F.3d at 618. Under the categorical approach, the relevant question is whether the elements necessarily require "the use, attempted use, or threatened use of physical force." If the offense can be completed through both violent and nonviolent means, the offense is categorically not a crime of violence. *Taylor*, 979 F.3d at 207. In focusing on the *acts* required to complete the offense, one realizes that the substantial step required for an attempt does not necessarily need to be violent.

Id. The substantial step can include obtaining the necessary equipment, planning with coconspirators, conducting surveillance of the would-be location of the robbery, or serving as a lookout of the robbery. *See supra* p. __. All of which do not require the defendant to use, attempt to use, or threaten to use physical force. *Id.*

To be clear, the categorical approach would not allow all inchoate crimes to escape from being classified as crimes of violence. Sixth Circuit case law refutes that point. In *United States v. Richardson*, this Court held that the inchoate offense of "aiding and abetting" Hobbs Act robbery is a violent felony because there is no distinction between the inchoate crime and committing the principal offense. 948 F.3d 733, 742 (6th Cir.), *cert. denied*, 141 S. Ct. 344 (2020). Because the aider and abettor is responsible for the acts of the principal, the aider and abettor of Hobbs Act robbery commits all the elements of the principal's Hobbs Act robbery. *Id.* at 426 (quoting *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016)). As a result, because the substantive crime of Hobbs Act robbery has to necessarily be completed to be liable as an aider and abettor, the inchoate offense "has as an element the use, attempted use, or threatened use of physical force" under § 924(c)(3)(A). *Id.* *Richardson* makes clear that the mere *intent* to commit each element of a substantive offense is not enough to transform an inchoate offense into a crime of violence. Indeed, the elements must require, as is the case for aider and abettor liability, violent physical force. An attempt crime does not have such a requirement.

2. "Attempt" in § 925(c) Does Not Mean that an Attempt Offense Qualifies as a Crime of Violence

Section 924(c)'s definition of a crime of violence includes the "attempted use" of physical force. Under the reasoning of other courts, because of this fact, a conviction for attempt to commit a crime of violence is necessarily sufficient to qualify under § 924(c). *Walker*, 990 F.3d at 327; *St. Hubert*, 909 F.3d at 352. The Eleventh Circuit reasoned that "the definition of a crime of

violence in § 924(c)(3)(A) equates the use of force with attempted force, and thus the text of § 924(c)(3)(A) makes clear that actual force need not be used for a crime to qualify under § 924(c)(3)(A)." *Id.*

The logical flaw in this reasoning is that the courts conflate the "attempt" (but failing) to commit a crime with the inchoate offense. This reasoning, however, does not align with the elements of an attempt offense. *St. Hubert II*, 918 F.3d at 1212 (J. Pryor, J., dissenting from denial of rehearing en banc). In other words, a person does not necessarily attempt to use physical force within the meaning of § 924(c) elements clause just because a defendant attempted a crime of violence. *Id.* A "crime of violence" requires as an element the "use, attempted use, or threatened use of physical force." The Hobbs Act statute defines robbery as the "actual or threatened force, or violence, or fear of injury." 18 U.S.C. § 1951(b)(1). Under Sixth Circuit case law, substantive Hobbs Act robbery is a crime of violence. *See United States v. Gooch*, 850 f.3d 285, 292 (6th Cir. 2017). If the Hobbs Act robbery could only be completed through the actual use of force, then there is no question that that the attempt to complete a Hobbs Act robbery would also be a crime of violence. The statute, however, defines robbery to include "threatened force." As a result, attempting a robbery through an attempted threat does not *require* the "use, attempted use, or threatened use of physical force." This demonstrates the logical flaw in the reasoning of *Walker* and *St. Hubert* because attempted Hobbs Act robbery does not, by definition, require the "attempted use" of physical force.

C. The Conclusion that Attempted Hobbs Act Robbery is not a Crime of Violence is Reinforced Through Other Reasoning.

1. The Common Law Definition of "Physical Force" Precludes Attempted Hobbs Act Robbery from Being a Crime of Violence

The Court in *Johnson II* examined the meaning of "physical force" under § 924(e)(2)(B)(i) of the ACCA. There, the petitioner pled guilty to knowingly possessing ammunition after having

been convicted of a felony in violation of § 922(g)(1). *Id.* at 135-36. The ACCA enhances prison penalties if the defendant had three previous convictions of a "violent felony," § 924(e)(1), which is defined as, *inter alia*, an offense that "has as an element the use . . . of physical force against the person of another." § 924(e)(2)(B)(i). At common law, "force" was used to describe the elements of battery which required the intentional application of unlawful force against another person. *Johnson I*, 559 U.S. at 139. The Court made clear that "physical force" means "violent force." *Id.* at 140. In other words, "force capable of causing physical pain or injury to another person." *Id.* In the context of the statute, "physical force" is not used in defining the crime of battery but rather the statutory category of "violent felony." *Id.* at 141-42. In *Castleman*, the Court examined the "physical force" requirement of § 922(g)(9), which defines the term under § 921(a)(33)(A)(ii). 572 U.S. 157, 162-68 (2014). The statute enhances penalties for "misdemeanor crime of domestic violence" if it involves the "use or attempted use of physical force." In determining the meaning of "force" under § 921(a)(33)(A), the Court imported the common law meaning into the definition of "misdemeanor crime of domestic violence" as an offense that "has, as an element, the use or attempted use of physical force" given that Congress demonstrated its intent to define "force" that was misdemeanor-specific. *Id.* at 168. As a result, mere battery could satisfy the force requirement under § 922(g)(9).

The holdings in *Johnson II* and *Castleman* demonstrate why attempted Hobbs Act robbery cannot be a crime of violence. "Physical force," at a minimum, requires the intentional touching of another as required for common law battery in order for an offense to have as an element the "use, attempted use, or threatened use of physical force." Attempted Hobbs Act robbery, however, does not require even minimal touching. One could be convicted of attempted Hobbs Act robbery through an attempted threat of violence. Such a sequence of events would not require a defendant

to touch, much less cause violent force. Due to this, under the categorical approach, one can deduce that the elements of an attempt crime does not require the use of actual force.

2. If Indeed Attempted Hobbs Act Robbery is Not a Crime of Violence, then Conspiracy to Commit Hobbs Act Robbery Would also be a Crime of Violence.

Concluding that attempted Hobbs Act robbery is a crime of violence would come into logical conflict with this Court's holding regarding conspiracy. Previously, this Court held that *conspiracy* to commit Hobbs Act robbery is not a crime of violence under the elements clause of § 924(c). *United States v. Ledbetter*, 929 F.3d 338, 361 (6th Cir. 2019). Under the Hobbs Act robbery statute, one can face criminal liability if she were to "conspire" "in any way or degree [to] obstruct[ ], delay[ ], or affect[ ] commerce or the movement of any article or commodity in commerce, by robbery." § 1951(a). This Court in *Ledbetter* recognized that, without the residual clause post-*Davis*, the prison enhancement for conspiracy to commit Hobbs Act robbery must be vacated. 929 F.3d at 361. This proposition falls in line with the decisions of other circuits. *See, e.g.*, *United States v. McCoy*, 995 F.3d 32, 44 (2d Cir. 2021); *United States v. Simms*, 914 F.3d 229, 234 (4th Cir. 2019) (en banc); *United States v. Davis*, 903 F.3d 483, 485 (5th Cir. 2018).

To prove conspiracy to commit Hobbs Act robbery, the government needs to prove an agreement to engage in conduct that would violate the statute. *United States v. Brantley*, 777 F.2d 159, 163 (6th Cir. 1985). The inchoate conspiracy offense for Hobbs Act robbery merely requires the government to prove that the conspiracy would have affected commerce. *United States v. DiCarlantonio*, 879 F.2d 1058, 1061 (6th Cir. 1989). The overt act requirement is not necessary to prove. *Brantley*, 777 F.2d at 163. Even though the government must prove that the defendant intended to commit every element of the underlying offense, under the categorical approach, conspiracy to commit Hobbs Act is not a crime of violence. This is because the "the Government must prove only that the defendant agreed with another to commit actions that, if realized, would

violate the Hobbs Act." *Simms*, 914 F.3d at 233-34. No violent act is required. The agreement, which creates criminal liability, does not require the actual, attempted, or threatened use of force.

Under the reasoning of the courts of appeals that have held that attempted Hobbs Act robbery is a crime of violence would necessarily have to make the same conclusion for the conspiracy to commit the offense. Under their approach, the mere *intent* to commit all the elements of the substantive crime means that the offense is a crime of violence. So to with conspiracy. A conspiracy requires the intent to commit all the elements of the underlying offense in the course of an agreement with another individual. Despite this, courts have held that conspiracy to commit Hobbs Act robbery, like in *Ledbetter*, is not a crime of violence. This comes down to the simple proposition that the elements of conspiracy does not necessarily require the use, attempted use, or threatened use of force under the "straightforward" application of the categorical approach. Consistent with conspiracy, attempted Hobbs Act robbery cannot be categorized as a crime of violence.

* * * * * * * *

At bottom, an attempted crime is a separate offense from the substantive crime. The attempted offense has distinct elements. Under the categorical approach, the relevant question is whether the elements of attempted Hobbs Act robbery necessarily require the use of physical force. This is separate and apart from whether the substantive crime necessarily require the use of physical force. As explained above, by both logic and experience, attempted Hobbs Act robbery does not require the use of physical force.

Applicant Details

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Applicant Education

BA/BS From	**University of Michigan-Ann Arbor**
Date of BA/BS	**April 2017**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 17, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**New York University Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Thomas Hislop
205 N. 7th St., #1B
Brooklyn, NY 11211

March 1, 2022

The Honorable Lewis J. Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Courtroom 15C
New York, NY 10007-1312

Dear Judge Liman:

I am writing to apply for a clerkship in your chambers for the 2024-25 term. I am a third-year law student at New York University School of Law and a Notes Editor for the *New York University Law Review*. Given your background and my interest in eventually becoming a federal prosecutor in New York City, I am especially interested in clerking for you. If I were selected for this opportunity, I would plan to work at Davis Polk & Wardwell LLP in New York before the clerkship begins.

Enclosed in my application, please find a copy of my resume, law school transcript, undergraduate transcript, and writing sample. I wrote the writing sample, which explores the scope of the Insurrection Act, as directed research under the supervision of Professor Barry Friedman. Professor Friedman provided limited feedback on the first and final drafts of the paper.

Letters of recommendation from New York University Professors Friedman (212-998-6293), Emma Kaufman (212-998-6250), and Anne Milgram (212-992-8832) will be sent separately. I serve as a research assistant for Professor Friedman, supporting his work with the American Law Institute on its Principles of Policing Project. I served as a teaching assistant for Professor Kaufman's Legislation and the Regulatory State course. I took part in Professor Milgram's local prosecution externship, through which I interned with the Brooklyn District Attorney's Office.

Thank you for your time and consideration. Please let me know if I can provide any additional information or if you have any questions. I can be reached by phone at 617-997-8817, or by email at tch371@nyu.edu.

Respectfully,
Thomas Hislop
Candidate for Juris Doctor 2022

THOMAS C. HISLOP

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EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Candidate for J.D., May 2022
Unofficial GPA: 3.80
Honors: *Florence Allen Scholar* (Top 10% of class after four semesters)
New York University Law Review, Notes Editor and Alumni Chair
Activities: Teaching Assistant, Professor Emma Kaufman, Legislation and the Regulatory State
U.S. Attorney's Office for the Southern District of New York, Criminal Division Extern
Brooklyn District Attorney's Office, Legal Extern

UNIVERSITY OF MICHIGAN, Ann Arbor, MI
B.A. in Public Policy, with Distinction, May 2017
Cumulative GPA: 3.87
Focus Area: The Effect of Current Education Policy on Future Economic Outcomes
Honors: *Phi Beta Kappa*
James B. Angell Scholar (Three consecutive terms achieving an "A" record in each class)
William J. Branstrom Freshman Prize (Top 5% of freshman class)
Activities: Central Student Government, Elected Representative and Ethics Committee Chairman

EXPERIENCE

DAVIS POLK & WARDWELL LLP, New York, NY
Summer Associate, Summer 2021
Participated in all aspects of complex commercial litigation matters, including a major white collar investigation and an antitrust matter involving a multinational telecommunications company. Wrote a client memorandum on the implied certification theory of liability under the False Claims Act. Researched and drafted a section of a brief for a pro bono false arrest matter. Prepared firm partner for a Senate confirmation hearing.

PROFESSOR BARRY FRIEDMAN, NYU SCHOOL OF LAW, New York, NY
Research Assistant, February 2021 – Present
Researched and drafted memoranda on the federal government's role in local law enforcement in support of the American Law Institute's Principles of Policing project. Edited and cite-checked the project's chapter on the promotion of sound policing practices within law enforcement agencies.

NYC LAW DEPARTMENT, New York, NY
Summer Honors Intern, Affirmative Litigation Division, Summer 2020
Researched and drafted memoranda for municipal attorneys on ongoing and potential litigation, including issues related to the state appropriations process and policing accountability. Worked closely with the Corporation Counsel to integrate research on adverse childhood experiences into the Department's juvenile justice processes.

HURON CONSULTING GROUP, Chicago, IL
Higher Education Strategy & Operations Consulting Associate, June 2017 – May 2019
Partnered with universities to identify and address the strategic, financial, and operational challenges they face, working closely with leadership to develop solutions that fit their unique needs.

CHARLIE BAKER, GOVERNOR OF MASSACHUSETTS, Boston, MA
Executive Office and Campaign Intern, Summers 2014 and 2015
Developed microtargeting strategies that identified key demographics based on previous voting tendencies, which was later lauded as a significant factor in the Governor's narrow 40,000 vote victory.

ADDITIONAL INFORMATION

Volunteered with the Pennsylvania Democratic Party's voter protection team for the 2020 election. Went backpacking across South America for three months prior to enrolling in law school. Enjoy hiking and sailing.

Name: **Thomas C Hislop**
Print Date: **01/24/2022**
Student ID: **N14909498**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2019

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Shirley Lin			
Criminal Law	LAW-LW 11147	4.0	A-
Instructor: Rachel E Barkow			
Procedure	LAW-LW 11650	5.0	A
Instructor: Burt Neuborne			
Contracts	LAW-LW 11672	4.0	B
Instructor: Clayton P Gillette			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: Policing the Big City			
Instructor: Barry E Friedman			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2020

School of Law
Juris Doctor
Major: Law

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Due to the COVID-19 pandemic, all spring 2020 NYU School of Law (LAW-LW.) courses were graded on a mandatory CREDIT/FAIL basis.
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Constitutional Law	LAW-LW 10598	4.0	CR
Instructor: Kenji Yoshino			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Shirley Lin			
Legislation and the Regulatory State	LAW-LW 10925	4.0	CR
Instructor: Emma M Kaufman			
Torts	LAW-LW 11275	4.0	CR
Instructor: Barry E Adler			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: Policing the Big City			
Instructor: Barry E Friedman			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2020

School of Law
Juris Doctor
Major: Law

Criminal Procedure: Fourth and Fifth Amendments	LAW-LW 10395	4.0	A-
Instructor: Stephen J Schulhofer			
Complex Federal Investigations Seminar	LAW-LW 11517	2.0	A
Instructor: James Orenstein			
Property	LAW-LW 11783	4.0	A-
Instructor: William E Nelson			
First Amendment Seminar	LAW-LW 11824	2.0	A
Instructor: Burt Neuborne			
Directed Research Option B	LAW-LW 12638	1.0	A
Instructor: Barry E Friedman			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	43.0	43.0

Spring 2021

School of Law
Juris Doctor
Major: Law

Corporations	LAW-LW 10644	4.0	A+
Instructor: Stephen J Choi			
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Emma M Kaufman			
Local Prosecution Externship	LAW-LW 12452	3.0	CR
Instructor: Anne M Milgram Evan Sean Krutoy			
Local Prosecution Externship Seminar	LAW-LW 12453	2.0	A
Instructor: Anne M Milgram Evan Sean Krutoy			
Science and the Courts	LAW-LW 12668	2.0	A
Instructor: Jed S Rakoff			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	56.0	56.0

Allen Scholar-top 10% of students in the class after four semesters

Fall 2021

School of Law
Juris Doctor
Major: Law

Survey of Securities Regulation	LAW-LW 10322	4.0	A
Instructor: Stephen J Choi			
Education Law Seminar	LAW-LW 11448	3.0	A
Instructor: Dennis David Parker			
Federal Courts and the Federal System	LAW-LW 11722	4.0	B+
Instructor: Trevor W Morrison			
Antitrust: Merger Enforcement and Litigation Seminar	LAW-LW 12723	2.0	A
Instructor: Joseph F. Tringali			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	69.0	69.0

Spring 2022

School of Law
Juris Doctor
Major: Law

Prosecution Externship - Southern District Seminar	LAW-LW 10835	2.0	***
Instructor: Margaret S Graham Negar Tekeei			
Law Review	LAW-LW 11187	2.0	***
Prosecution Externship - Southern District	LAW-LW 11207	3.0	***
Instructor: Margaret S Graham Negar Tekeei			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	***
Instructor: Tyler Maulsby			
Evidence	LAW-LW 11607	4.0	***
Instructor: Daniel J Capra			
Research Assistant	LAW-LW 12589	1.0	***
Instructor: Barry E Friedman			

	AHRS	EHRS
Current	14.0	0.0
Cumulative	83.0	69.0

Staff Editor - Law Review 2020-2021
Notes Editor - Law Review 2021-2022

End of School of Law Record

THE UNIVERSITY OF MICHIGAN – ANN ARBOR

Unofficial Transcript - Not an Official Transcript

Hislop,Thomas Christian
UM ID: 18070852 UIC: 6880183473
Uniqname: THHISLOP

Date: May 25, 2021

Citizen: U.S. Citizen

Hislop,Thomas Christian (617) 997-8817
1405 N. Wells St.
Chicago, IL 60610
United States

University of Michigan Degrees Awarded

School/College: Public Policy
Major: Public Policy
Degree: Bachelor of Arts, With Distinction
Awarded: 27-Apr-2017

Fall 2013		Undergraduate L S & A	Grade	Hours	MSH	CTP	MHP
Transfer Test Credit							
Advanced Placement							
ENGCMPTC	101X	Departmental	T	0.00	0.00	3.00	0.00
HISTART	102	Ren to Mod	T	0.00	0.00	3.00	0.00
Undergraduate L S & A							
Transfer Credit Accepted:					**0.00**	**6.00**	**0.00**

Fall 2013		Undergraduate L S & A	Grade	Hours	MSH	CTP	MHP
GTBOOKS	191	Honrs Grt Bks	A	4.00	4.00	4.00	16.00
		Honors					
HISTORY	365	New York Modern	A	4.00	4.00	4.00	16.00
		Honors					
POLSCI	111	Intro Amer Pol	A	4.00	4.00	4.00	16.00
SPANISH	101	Elementary	A	4.00	4.00	4.00	16.00
Term Total		**GPA: 4.000**		**16.00**	**16.00**	**16.00**	**64.00**
Cumulative Total		**GPA: 4.000**			**16.00**	**22.00**	**64.00**

Winter 2014		Undergraduate L S & A	Grade	Hours	MSH	CTP	MHP
ACABS	277	Lnd Israel-Palestine	A	4.00	4.00	4.00	16.00
EARTH	125	Evol&Extinctn	A	3.00	3.00	3.00	12.00
ECON	101	Principle Econ I	B	4.00	4.00	4.00	12.00
ECON	108	Intro Micro	CR	1.00	0.00	1.00	0.00
		Honors					
		Economic Analysis Through					
		Service Learning					
SPANISH	102	Elementary	A	4.00	4.00	4.00	16.00
Term Total		**GPA: 3.733**		**16.00**	**15.00**	**16.00**	**56.00**
Cumulative Total		**GPA: 3.870**			**31.00**	**38.00**	**120.00**

Fall 2014		Undergraduate L S & A	Grade	Hours	MSH	CTP	MHP
ECON	102	Principle Econ II	A	4.00	4.00	4.00	16.00
PHIL	297	Honors-Introd	A-	3.00	3.00	3.00	11.10
		Honors					
PUBHLTH	200	Hlt&Society:Intro PH	A-	4.00	4.00	4.00	14.80
PUBPOL	201	Systematic Thinking	A-	4.00	4.00	4.00	14.80
Term Total		**GPA: 3.780**		**15.00**	**15.00**	**15.00**	**56.70**
Cumulative Total		**GPA: 3.841**			**46.00**	**53.00**	**176.70**

Winter 2015		Undergraduate L S & A	Grade	Hours	MSH	CTP	MHP
AOSS	102	Extreme Weather	A	3.00	3.00	3.00	12.00
POLISH	331	Poland in Mod World	A	4.00	4.00	4.00	16.00
POLSCI	140	Int Compar Pol	A	4.00	4.00	4.00	16.00
STATS	250	Intr Stat&Data Anlys	A	4.00	4.00	4.00	16.00
Term Total		**GPA: 4.000**		**15.00**	**15.00**	**15.00**	**60.00**
Cumulative Total		**GPA: 3.880**			**61.00**	**68.00**	**236.70**

Spring 2015		Undergraduate L S & A	Grade	Hours	MSH	CTP	MHP
SPANISH	230	Intensive 2nd Yr	A-	8.00	8.00	8.00	29.60
		Argentina Study Abroad					
Term Total		**GPA: 3.700**		**8.00**	**8.00**	**8.00**	**29.60**
Cumulative Total		**GPA: 3.859**			**69.00**	**76.00**	**266.30**

Fall 2015		Undergraduate Public Policy	Grade	Hours	MSH	CTP	MHP
Transfer Test Credit							
Advanced Placement							
ENGCMPTC	101X	Departmental	T	0.00	0.00	3.00	0.00
HISTART	102	Ren to Mod	T	0.00	0.00	3.00	0.00

THE UNIVERSITY OF MICHIGAN – ANN ARBOR

Unofficial Transcript - Not an Official Transcript

Hislop,Thomas Christian
UM ID: 18070852 UIC: 6880183473
Uniqname: THHISLOP

Fall 2015		Undergraduate Public Policy	Grade	Hours	MSH	CTP	MHP
Transfer Course Credit							
ACABS	201X	Departmental	A	0.00	4.00	4.00	16.00
AOSS	102	Extreme Weather	A	0.00	3.00	3.00	12.00
EARTH	125	Evol&Extinctn	A	0.00	3.00	3.00	12.00
ECON	101	Principle Econ I	B	0.00	4.00	4.00	12.00
ECON	102	Principle Econ II	A	0.00	4.00	4.00	16.00
ECON	108	Intro Micro	CR	0.00	0.00	1.00	0.00
GTBOOKS	191	Honrs Grt Bks	A	0.00	4.00	4.00	16.00
HISTORY	365	New York Modern	A	0.00	4.00	4.00	16.00
PHIL	297	Honors-Introd	A-	0.00	3.00	3.00	11.10
POLISH	331	Poland in Mod World	A	0.00	4.00	4.00	16.00
POLSCI	111	Intro Amer Pol	A	0.00	4.00	4.00	16.00
POLSCI	140	Int Compar Pol	A	0.00	4.00	4.00	16.00
PUBHLTH	200	Hlt&Society:Intro PH	A-	0.00	4.00	4.00	14.80
PUBPOL	201	Systematic Thinking	A-	0.00	4.00	4.00	14.80
SPANISH	101	Elementary	A	0.00	4.00	4.00	16.00
SPANISH	102	Elementary	A	0.00	4.00	4.00	16.00
SPANISH	230	Intensive 2nd Yr	A-	0.00	8.00	8.00	29.60
STATS	250	Intr Stat&Data Anlys	A	0.00	4.00	4.00	16.00
Undergraduate Public Policy							
Transfer Credit Accepted:					69.00	76.00	266.30

Fall 2015		Undergraduate Public Policy	Grade	Hours	MSH	CTP	MHP
PUBPOL	320	Politics & Pub Pol	A-	4.00	4.00	4.00	14.80
PUBPOL	330	Microeconomics	A-	4.00	4.00	4.00	14.80
PUBPOL	422	Cong&State Legis	A	4.00	4.00	4.00	16.00
PUBPOL	495	Policy Seminar	A	4.00	4.00	4.00	16.00
		Apology, Reconcil, Repar & PP					
Term Total		GPA: 3.850		16.00	16.00	16.00	61.60
Cumulative Total		GPA: 3.857			85.00	92.00	327.90

Winter 2016		Undergraduate Public Policy	Grade	Hours	MSH	CTP	MHP
ASTRO	142	Big Bang P/F	P	3.00	0.00	3.00	0.00
ECON	325	Econ Education	B+	3.00	3.00	3.00	9.90
		Upper Level Writing					
		Requirement Satisfied					
HISTORY	282	Hist of the Economy	A+	4.00	4.00	4.00	16.00
PSYCH	401	Special Problems	A	2.00	2.00	2.00	8.00
		Research in Educational					
		Settings					
PSYCH	457	Curr Topic Dev Psych	A	3.00	3.00	3.00	12.00
		Res Meth in Edu and Cross-cult					
		Upper Level Writing					
		Requirement Satisfied					
Term Total		GPA: 3.825		15.00	12.00	15.00	45.90
Cumulative Total		GPA: 3.853			97.00	107.00	373.80

Fall 2016		Undergraduate Public Policy	Grade	Hours	MSH	CTP	MHP
PUBPOL	475	Topics in Pub Pol	A	3.00	3.00	3.00	12.00
		Poverty & Inequality					
PUBPOL	475	Topics in Pub Pol	A	3.00	3.00	3.00	12.00
		US Higher Ed System					
Term Total		GPA: 4.000		6.00	6.00	6.00	24.00
Cumulative Total		GPA: 3.862			103.00	113.00	397.80

Winter 2017		Undergraduate Public Policy	Grade	Hours	MSH	CTP	MHP
EARTH	114	Global Warming	A	1.00	1.00	1.00	4.00
PUBPOL	423	Pol Campaign Strateg	A	3.00	3.00	3.00	12.00
PUBPOL	495	Policy Seminar	A	4.00	4.00	4.00	16.00
		US Social Policy					
Term Total		GPA: 4.000		8.00	8.00	8.00	32.00
Cumulative Total		GPA: 3.872			111.00	121.00	429.80

Academic Statistics for Undergraduate Public Policy		MSH	CTP	MHP
Total to Date	GPA: 3.872	111.00	121.00	429.80

Program Action History: Public Policy UG Degree
05/31/2017 Completion of Program
Public Policy BA
03/19/2015 Activate
Public Policy BA

Academic Statistics for Undergraduate L S & A		MSH	CTP	MHP
Total to Date	GPA: 3.859	69.00	76.00	266.30

THE UNIVERSITY OF MICHIGAN – ANN ARBOR

Unofficial Transcript - Not an Official Transcript

Hislop,Thomas Christian
UM ID: 18070852 UIC: 6880183473
Uniqname: THHISLOP

Program Action History: Lit, Sci, and the Arts UG Deg

09/07/2015 Discontinuation
LSA Undeclared
09/07/2015 Discontinuation
Honors
05/23/2013 Plan Change
LSA Undeclared
05/23/2013 Plan Change
Honors
04/15/2013 Matriculation
LSA Undeclared

Honors, Non-Degree

12/20/2013 University Honors
03/16/2014 William J. Branstrom Freshman Prize
05/01/2014 University Honors
12/19/2014 University Honors
04/30/2015 University Honors
12/23/2015 University Honors
03/20/2016 James B. Angell Scholar
04/28/2016 University Honors
04/09/2017 Phi Beta Kappa

Academic Previous Experience

Buckingham Browne & Nichols Sc	MA, United States
High School Diploma	06/06/2013

End of Unofficial Transcript

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Barry Friedman
Jacob D. Fuchsberg Professor of Law
Affiliated Professor of Politics
Faculty Director, Policing Project

RE: Thomas Hislop

Dear Judge,

I am writing on behalf of Thomas Hislop, who is applying to clerk in your chambers beginning in the fall of 2022 or any time thereafter. I've been fortunate to work with Thomas in a variety of settings, and in each his work has been highly self-motivated and uniformly impressive. I am delighted to recommend him to you in the highest of terms.

I first got to know Thomas as a 1L when he signed up for my small reading group, Policing the Big City. This is a course I co-taught with former NYPD Police Commissioner James O'Neill. Our 1L reading groups are designed to allow the 1Ls a non-graded opportunity to explore an topic that is law related, while getting to know some classmates and a professor in a more intimate way than the large classroom setting. We read a wide variety of materials and took a couple of field trips, the last one ending as the school and city shut down because of COVID.

Thomas was terrific in the 1L group. It was ungraded, but that had its advantages in that it allowed the students a chance to shine in a more relaxed atmosphere. Thomas was quietly confident, open to learning but deeply thoughtful, and a real motivator of discussion.

The next year, Thomas asked me to supervise a directed research paper on legal and political limits on presidential power under the Insurrection Act. The motivation for the paper was President Trump's suggestion that he might use military troops to quell distrubances in the wake of the killing of George Floyd in the spring of 2020. I told Thomas I was extremely reluctant to take this project on, as I had a number of extremely pressing commitments. He persisted in asking, including assuring me I would not have to do a lot of work and that he was self-motivated to get the project done. Eventually we agreed on a set of terms under which I would supervise the paper so long as he missed no deadlines and performed as promised.

I'll speak to how Thomas performed under our "contract" in a moment, but first a word on the paper itself, because it bears substantially on the traits required of a clerk. The paper stands as testament to the fact that Thomas is an excellently clear writer and an A+ researcher. I had my suggestions along the way as to directions, and did some of the usual editing to reinforce good writing etiquette. But rarely do I see early 2L writing cross my desk that was as polished and clear as Thomas's. I was impressed to watch him run down every rabbit hole ensuring he had

covered the field. And the paper is smart, which is evident as well from Thomas's grades, which must put him near the top of the class.

But in addition to these essentials, Thomas made good on every commitment to me. His professionalism then, and since then in the work we have done together, is remarkable. He is incredibly self-motivated, and does precisely what it is he says he will do. He is utterly reliable, again to a degree I all too rarely see.

Thomas crossed my doorstep yet again this spring. I am the Reporter for an American Law Institute project, Principles of the Law: Policing. One of Thomas's friends was working with me on that project, and asked if I needed help. I said I was not sure (at the moment I wasn't, though it became clear quickly we had a lot of work to do). Despite my brush off, Thomas wrote asking to work with me. Thomas is, in the best of ways, persistent, and also steps up.

Thomas is working on a principle regarding the federal government's role in local policing. The work has required of him both a chunk of doctrinal research, but also a lot of learning of the practicality of policing and what the DOJ does or does not do. His work has been, in a word, fantastic. He's exhibited capability well beyond what I expect of even 3Ls working on this project, and once again with a huge amount of self-motivation. Where I want research, Thomas comes forward with impeccably organized notes. Although I did not ask for drafting, he takes a shot and often succeeds. All the work comes to me ready for me to bust through it, doing the drafting I need to do (and often accepting his own).

I'd hire Thomas for anything. I wish I could clone him, to be honest. A retinue of Thomases and my work would be a breeze. He's super smart, hugely capable, a terrific writer.

And, he's a great person. He's funny, in a quiet but evident way that keeps me smiling. He's dependable, so I never have to worry about the work. He's steadfast and unperturbed by deadlines. Thomas is going to work eventually in the criminal justice system, likely as a prosecutor, and has some political aspirations, back home in the Boston area. I'm sure he will accomplish whatever he sets out to do.

In short, I have huge respect for Thomas and urge you to interview him. I'm sure you will like him, and I'd be surprised if you do not hire him.

I'd be happy to answer any further questions.

Best regards,

Barry Friedman

March 01, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

We write to highly recommend Thomas Hislop as a judicial clerk in your chambers.

We had the pleasure of teaching Thomas in our NYU Law Local Prosecution Externship during the spring semester of 2021. During this clinic, Thomas served as an intern with the Brooklyn District Attorney's Office. In this role, Thomas assisted prosecutors with serious, felony cases and was assigned his own individual misdemeanor case load. Thomas was responsible for handling all aspects of the prosecution of his misdemeanor cases, including working directly with police officers, witnesses, and victims of crime. Each week during class he shared with us the progress on the cases he worked on. As such, we can speak directly to his exceptional contributions to our clinic program as well as to his academic abilities and aptitude for future professional practice.

Thomas brought an intellectual curiosity, an unwavering positivity, and a warm sense of humor to our clinic discussions. Rather than just complete the tasks handed to him, Thomas was always asking questions to better understand the work of a criminal prosecutor. For instance, he was tasked with handling a theft from a jewelry store where a store employee, the critical witness, was hesitant to cooperate. Thomas thoughtfully explored the tension between the witness' concern about cooperating and the traditional goal of the criminal justice system to bring safety and justice to individuals and communities on behalf of the government. Our discussions about this case revealed Thomas's thoughtfulness when navigating thorny issues, and his willingness to face the complexities of the real world that criminal prosecutors are constantly called upon to navigate. It also spurred an engaging conversation among Thomas and his classmates, which enriched the learning experience of all.

In addition to exceling in the classroom, Thomas earned the respect and gratitude of the prosecutors that he partnered with in Brooklyn. The supervisors consistently praised his initiative and willingness to take on new assignments. Not surprisingly, Thomas's supervisor informed him at the conclusion of the semester that he had a full-time role waiting for him in the office if he ever wanted to return.

Thomas has a strong and genuine desire to enter into a career in public service after law school. He sincerely views the law as a tool for change and we believe Thomas's intellect, warm personality, and drive will enable him to be an exceptional judicial clerk and, later in his career, a dedicated public servant.

For all of these reasons, we are confident Thomas will not only succeed in your chambers but will also thrive as a law clerk. If we can provide additional information in support of Thomas's application, please do not hesitate to contact Evan Krutoy at 718-757-0834.

Sincerely,

Anne M. Milgram

Evan Krutoy

Anne Milgram - anne.milgram@nyu.edu - (212) 992-8832

New York University
A private university in the public service

School of Law

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New York, NY 10012-1099
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June 14, 2021

RE: Thomas Hislop, NYU Law '22

Your Honor:

I'm writing to recommend Thomas Hislop, who has applied for a clerkship in your chambers. Thomas is a stellar law student: a standout performer with top grades who's been tapped for coveted positions as a Teaching Assistant and a member of the *Law Review*. He's also warm, easy-going, and dependable. He would make an excellent law clerk.

I first met Thomas when he was a student in my 84-person course called Legislation and the Regulatory State (LRS). LRS, a required first-year course at NYU, can be challenging for many students. It is a crash course in statutory interpretation, structural constitutional law, and administrative law—full of tricky, unsettled doctrine and recent Supreme Court cases. LRS is a real conceptual departure for 1Ls who have been taking common-law courses like torts and criminal law, so it becomes a class where the most intellectually curious and serious students can rise to the occasion.

Thomas was a star. He sat in the second row, well-prepared and reliable but never over-zealous. Sometimes my sharpest students lack a certain self-awareness—volunteering too much, talking rather than listening, and so on. Thomas was not that he student. He clearly understood both the material and the collective enterprise of the classroom. He is, in other words, equal parts smart and mature.

I did not give Thomas a grade in my course because the COVID-19 pandemic began about three weeks into the semester. Given the uneven effects the sudden onset of the pandemic had on the 1L class, the law school switched to a pass-fail format for the semester. But I can say that Thomas excelled in LRS, so much that I asked him to be my Teaching Assistant the following year. I take TA hiring seriously, extending offers only to students who display both mastery of the subject and the sort of confidence and warmth that makes a good role model. Thomas has not disappointed. His work as a TA has been first-rate.

I'm not at all surprised to see Thomas doing equally well in other courses. His grades are excellent: one B in his first semester surrounded by A-range grades for two full years. This is no small feat at a law school where the students are smart and the curve is real, not to mention during two years defined by a global pandemic. Thomas continued to shine this semester, earning (among

other things) an A+ in Corporations, a tough and highly-subscribed course. To put that accomplishment into perspective, in large classes of more than 80 students, I sometimes give no A+s and sometimes give one.

In short, Thomas is the real deal. He's crisp, professional, and lawyerly in the best sense of the word. His work for you will be timely and correct, and he'll make your chambers easier to run. Having clerked for two years—first in the Southern District of New York, then on the D.C. Circuit—I appreciate the value of a dependable law clerk. Thomas would be precisely that sort of hire.

I know Thomas would learn a tremendous amount from working for you and I hope you'll take a serious look at his application. Please do not hesitate to reach out if I can offer any additional information.

Sincerely,

Emma Kaufman

WRITING SAMPLE OF THOMAS HISLOP
NEW YORK UNIVERSITY SCHOOL OF LAW
J.D. CLASS OF 2022

Written as Directed Research During the Fall 2020 Semester Under the Supervision of:
Barry Friedman
Jacob D. Fuchsberg Professor of Law
New York University School of Law

When the Executive Trumps: Examining the President's Unilateral Authority Under the Insurrection Act

Introduction

In response to a wave of protests and riots following the police killing of George Floyd in May 2020, President Donald Trump repeatedly suggested he was considering deploying troops to fight what he referred to as "violent crime" in American cities.[1] To deploy the military domestically, President Trump would have needed to invoke the Insurrection Act. Ultimately, President Trump never did deploy troops on American soil in the aftermath of the protests (although the Department of Justice did send federal law enforcement agents to nine cities to aid localities in their fight against urban crime).[2] While some local officials welcomed limited federal law enforcement aid, others reported being blindsided by the federal intervention, receiving little to no notice of the federal agents' presence in their jurisdictions.[3] Furthermore, officials from some of the jurisdictions into which President Trump stated he might deploy troops into had rejected any federal intervention explicitly.[4]

In light of these recent events, this Essay seeks to understand the conditions under which President Trump has the power to unilaterally deploy the military domestically to address urban

[1] *See, e.g.*, Jake Horton, *Does Trump Have the Right to Send in Federal Forces?*, BBC (Sept. 2, 2020), https://www.bbc.com/news/world-us-canada-52893540 (noting President Trump has repeatedly threatened to deploy the military domestically to combat crime in cities "he says are seeing rising rates of violent crime").
[2] By mid-August, Department of Justice agencies sent federal agents to nine cities in nine different states. *FBI Agents and Resources Supporting Operation Legend*, FBI (Aug. 14, 2020), https://www.fbi.gov/news/stories/fbi-agents-and-resources-support-operation-legend-in-nine-cities-081420.
[3] *See* Tessa Berenson, *'We're Pawns in this Game.' Mayors Worry Trump's Operation Legend Is More About Politics than Law Enforcement*, TIME (Aug. 13, 2020, 2:53 PM), https://time.com/5878817/operation-legend-mayors-albuquerque-chicago-kansas-city/ (detailing the limited notice some mayors received that federal agents were arriving in their cities).
[4] *See* Madeleine Carlisle, *What Is the Insurrection Act and Does it Give Trump the Authority to Send Military Troops into States? Here's What to Know*, TIME (June 2, 2020, 4:10 PM), https://time.com/5846649/insurrection-act-1807-donald-trump/ (noting that Governors Cuomo and Pritzker preemptively declined to request any federal military intervention).

crime.[5] This Essay considers if the Insurrection Act's text itself, the courts, or the court of public opinion place meaningful restrictions on the President's unilateral authority under the Act. It reasons that the Insurrection Act's broad text grants President Trump extensive unilateral authority to deploy troops domestically. Aggrieved parties seeking to cast doubt on the President's decision to invoke the Insurrection Act may find courts unwilling to test the executive's authority due to the Act's textual ambiguity and the political nature of the use of the military. Ultimately, if public opposition fails to mount, the President's own appreciation for the gravity of domestic military intervention may represent the greatest check on his authority. Given his past divergences from presidential norms, there is little reason to believe President Trump will demonstrate the same restraint past Presidents have exhibited.

I. The Nation's Traditional Opposition to Domestic Military Intervention

This Section first reviews the constitutional and statutory protections the Framers and subsequent members of Congress adopted to shield the nation from domestic military intervention and then considers the scope of the Insurrection Act. When the federal government intervenes in domestic policing efforts against the will of a local government, it risks infringing on the rights of the states. The Constitution never delegates the power to police domestically to the federal government. If a power is not one "delegated to the United States by the Constitution," it is reserved to the states under the Tenth Amendment.[6] The Supreme Court accordingly has recognized that domestic policing is a power of the state.[7] This fear of military

[5] This Essay assumes Congress possesses the authority to pass the Insurrection Act in the first instance. For a critical analysis of the Act's constitutionality, see William C. Banks, *Providing "Supplemental Security" - The Insurrection Act and the Military Role in Responding to Domestic Crises*, 3 J. NAT'L SEC. L. & POL'Y 39 (2009).
[6] U.S. CONST. amend. X.
[7] *See* United States v. Morrison, 529 U.S. 598, 599 (2000) ("The Constitution requires a distinction between what is truly national and what is truly local, and there is no better example of the police power, which the Founders undeniably left reposed in the States and denied the central Government, than the suppression of violent crime and vindication of its victims.").

intervention into civilian affairs dates back to the nation's founding and continues to apply today.[8]

Despite this assumed reservation, the possibility of a central government that could not ensure the protection of life, liberty, or property concerned some of the nation's founders more than a central government that harbored tyrannical tendencies.[9] In *Federalist No. 23*, Alexander Hamilton went so far as advocating that the federal power to provide for common defense "ought to exist without limitation."[10] Hamilton believed that this power could not be limited to "external attacks," but must be necessarily extended to "internal convulsions" as well.[11] The colonies relied on militias to both fend off foreign threats and confront domestic disturbances when local law enforcement alone did not suffice.[12] Although the abuses of the British military were top of mind for the Framers, they understood they needed to balance the dangers of an overly strong centralized military with the importance of maintaining a government capable of responding to internal crises.[13]

The Constitution reflects this balance. Rather than grant Congress broad authority to deploy the military domestically, the Constitution identifies three scenarios in which Congress may call on the military. Under the Calling Forth Clause of Article I of the Constitution, Congress may "provide for calling forth the Militia to execute the Laws of the Union, suppress

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[8] *See* Laird v. Tatum, 408 U.S. 1, 15 (1972) (noting a "traditional and strong resistance of Americans to any military intrusion into civilian affairs"); Reid v. Covert, 354 U.S. 1, 33 (1957) (recognizing a "deeply rooted and ancient opposition in this country to the extension of military control over civilians"); *see also* CONG. RSCH. SERV., R42659, THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW 1 (2018) ("Americans have a tradition, born in England and developed in the early years of our nation, that abhors military involvement in civilian affairs . . . .").
[9] Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding before any More Damage Is Done*, 175 MIL. L. REV. 86, 93 (2003).
[10] THE FEDERALIST No. 23 (Alexander Hamilton).
[11] *Id.*
[12] Banks, *supra* note 5, at 48.
[13] Stephen Vladeck, *The Calling Forth Clause and the Domestic Commander in Chief*, 29 CARDOZO L. REV. 1091, 1097 (2008) [hereinafter Vladeck, *The Calling Forth Clause*].

Insurrections and repel Invasions."[14] Early on, Congress assumed this Clause enabled the legislative body to call forth both the militia and the federal military.[15] Relying on this invitation, Congress promptly authorized the President to employ forces when insurrections or invasions transpired, battles with the Native Americans occurred, or when unrest obstructed the enforcement of domestic laws.[16]

The lack of a forceful constitutional limitation on the military's intrusion into domestic affairs became a point of concern following the Civil War. As the war ended and Reconstruction commenced, President Andrew Johnson announced a proclamation that permitted provisional governors in Southern states to create civilian governments.[17] President Johnson instructed the Army to "assist the said provisional governor in carrying into effect this proclamation."[18] As a result of this broad, vague mandate, the Army occupied the war-torn South with minimal limitations on its authority. The Army's presence represented a point of humiliation for Southern whites.[19] Soldiers, a majority of whom were black,[20] relished the opportunity to taunt Southerners over their loss of the war and the demise of slavery.[21] Eventually, when controversy ensued following the Army's observation of polling stations during the 1876 election, members of Congress advocated for a statutory limit on the executive's authority to deploy troops

[14] U.S. CONST. art. I, § 8, cl. 15.
[15] *See* Vladeck, *The Calling Forth Clause*, *supra* note 13, at 1096 (examining Congress's historical interpretation of the Calling Forth Clause).
[16] *See* CONG. RSCH. SERV., *supra* note 8, at 7 (explaining the history of the President's authority to call on the militia).
[17] MARK L. BRADLEY, THE ARMY AND RECONSTRUCTION, 1865-1877, at 13 (2015).
[18] *Id.* at 14.
[19] Felicetti & Luce, *supra* note 9, at 101.
[20] BRADLEY, *supra* note 17, at 16.
[21] Felicetti & Luce, *supra* note 9, at 101–02.

domestically. As a concession following his contested 1876 election victory, President Hayes conceded to the limitation on his authority.[22] The 1878 Posse Comitatus Act resulted.[23]

Under the Posse Comitatus Act, the Army and the Air Force cannot execute domestic laws unless expressly authorized by the Constitution or by Congress. The Supreme Court has only referenced the Act once, and lower courts have failed to develop a single, decisive test to determine what level of military intervention in local law enforcement is appropriate under the Act.[24] This limited jurisprudence results in a number of outstanding questions regarding the Act's application. Since its enactment, the military has implemented a series of internal directives that circumscribe its own powers under the Act,[25] but these directives are subject to revision at the whim of any new administration's military command. The constitutionality of the Posse Comitatus Act also remains an open question. In 1957, President Dwight Eisenhower's Attorney General argued that Congress cannot limit the President's authority to preserve peace or enforce federal law. In 1989, President Ronald Reagan's Office of Legal Counsel asserted the Act does not extend to situations in which only the military could ensure the execution of the laws.[26]

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[22] Arthur Rizer, *Trading Police for Soldiers: Has the Posse Comitatus Act Helped Militarize Our Police and Set the Stage for More Fergusons?*, 16 NEV. L.J. 467, 475 (2016).
[23] The Posse Comitatus Act is codified at 18 U.S.C. § 1385.
[24] *See* Rizer, *supra* note 22, at 478 (overviewing precedent commenting on the Posse Comitatus Act); Scott R. Anderson & Michael Paradis, *Can Trump Use the Insurrection Act to Deploy Troops to American Streets?*, LAWFARE (June 3, 2020, 8:47 AM), https://www.lawfareblog.com/can-trump-use-insurrection-act-deploy-troops-american-streets (noting courts "have struggled to reach consensus on what exactly the *posse comitatus* restriction prohibits").
[25] *Cf.* John R. Longley III, *Military Purpose Act: An Alternative to the Posse Comitatus Act– Accomplishing Congress's Intent with Clear Statutory Language*, 49 ARIZ. L. REV. 717, 738–39 (2007) (arguing that, by implementing self-constraining limitations, the Department of Defense has "done an excellent job of drafting directives to implement" the Posse Comitatus Act).
[26] Michael Bahar, *The Presidential Intervention Principle: The Domestic Use of the Military and the Power of the Several States*, 5 HARV. NAT'L SEC. J. 537, 601 n.285 (2014) (describing executive challenges to the constitutionality of the Posse Comitatus Act).

The Posse Comitatus Act invites Congress to create exceptions to its prohibition on domestic military deployment, an invitation that Congress has accepted on a number of occasions. Because the Act presumes that the military cannot execute domestic laws, any effort to understand a President's authority to respond to internal crises must account for the exceptions Congress implemented.

The most prominent and relevant exception to the Posse Comitatus Act is the Insurrection Act.[27] The precursor to the contemporary Insurrection Act, the Calling Forth Act of 1792, allowed the President to call on the militia to execute the laws of the land, suppress insurrections, and repel invasions.[28] The 1792 Act required the President to first seek judicial confirmation that the laws of the Union had been so obstructed that the President's employment of the militia was necessary.[29] Although the Act included a sunset provision that only delegated Congress's constitutional authority to the President temporarily, President George Washington's successful suppression of the Whiskey Rebellion led Congress to reenact the Act permanently in 1795.[30] Under the 1795 Militia Act, the President no longer needed to seek judicial approval before calling on the militia.[31]

A little over a decade later, Congress supplemented the 1795 Militia Act by enacting the Insurrection Act of 1807. The Insurrection Act has changed little since Congress first enacted it.[32] While the Insurrection Act removed a number of limitations on the President's authority,[33]

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[27] The Insurrection Act is codified at 10 U.S.C. §§ 251–255.
[28] Calling Forth Act of 1792, ch. 28, 1 Stat. 264 (repealed 1795).
[29] *See* Thaddeus Hoffmeister, *An Insurrection Act for the Twenty-First Century*, 39 STETSON L. REV. 861, 877 (2010).
[30] *See id.* at 879 (reviewing why Congress declined to sunset the 1792 Calling Forth Act).
[31] *See* Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 162 (2004) (explaining how the 1795 Act "removed–or heavily diluted–several of the major checks on the President's authority" found in the 1792 Act) [hereinafter Vladeck, *Emergency Power and the Militia Acts*].
[32] CONG. RSCH. SERV., *supra* note 8, at 34.
[33] For additional analysis regarding the changes the Insurrection Act of 1807 enacted, see Hoffmeister, *supra* note 29, at 882. Unlike its precursors, the 1807 Insurrection Act does not permit the President to deploy troops in order to

the Insurrection Act most importantly enabled the President to call on either the militia or the military.[34] The 1795 Act only permitted the President to call on the militia, but not the military, during domestic crises.

The Act identifies three circumstances under which the President may deploy the military domestically. First, under 10 U.S.C. § 251, the President may employ the military when the state government, either through its legislature or governor, requests federal aid.[35] Presidents relied on this Section to deploy troops during domestic race and labor riots on a number of occasions.[36] Most recently, George H.W. Bush sent federal troops into Los Angeles during the 1992 Rodney King riots after the Governor of California requested federal assistance.[37] Section 251 is distinct in that it only permits the President to act when assistance is requested by the state. Under the latter two sections of the Insurrection Act, the President may deploy troops unilaterally. Because Section 251 requires the state and federal government to act collectively, this portion of the statute is less likely to prompt fears that the President is abusing his executive authority. Invocation of this Section demands federal and state cooperation.

Under Section 252, the President may deploy the military whenever he considers "unlawful obstructions, combinations, or assemblages, or rebellion" to have made it "impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings."[38] This Section invites the President's subjective judgment regarding the

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repeal invasions. Congress likely made this change because it assumed the President already possessed the constitutional power to repel invasions. *Id.*

[34] *See* Banks, *supra* note 5, at 60 (explaining that, following the enactment of the Insurrection Act, it became "standard practice to use the standing army in domestic law enforcement emergencies instead of the militia").

[35] 10 U.S.C. § 251.

[36] *See* CONG. RSCH. SERV., *supra* note 8, at 34 (detailing occasions when Presidents invoked the Insurrection Act after receiving a request for assistance from states).

[37] *See* Proclamation No. 6427, 57 Fed. Reg. 19,359 (May 1, 1992) (describing the rationale behind President Bush's decision to send troops to ensure civil order in Los Angeles).

[38] 10 U.S.C. § 252.

need for federal intervention, and it authorizes the President to act even when a state opposes federal participation.

Finally, under Section 253, the President may deploy the military when domestic violence, an insurrection, an unlawful combination, or a conspiracy so hinders a state's ability to execute the laws that its citizens are denied equal protection of the laws.[39] This Section laid dormant following the Reconstruction era, but Presidents Eisenhower and Kennedy eventually invoked it during the civil rights movement as tensions rose between the federal government and Southern states.[40]

The text of the Insurrection Act leaves the President with an authority to act alone that is undoubtedly broad but ill-defined. The Act never explains what qualifies as "domestic violence" or an "unlawful obstruction" or what constitutes an "insurrection".[41] Section 252's reliance on the President's subjective discernment seemingly invites the President to define the scope of the terms listed. Section 253 permits the President to deploy troops to ensure the execution of federal laws, but there are thousands upon thousands of federal laws. Does the statute invite the President to send in the military to ensure the execution of *any* federal law? For example, consider an isolated incident of civil unrest in which protestors knowingly delay mail deliveries, violating federal law.[42] The locality, overwhelmed by this recent disturbance, fails to

[39] 10 U.S.C. § 253.
[40] CONG. RSCH. SERV., *supra* note 8, at 42.
[41] *See* Hoffmeister, *supra* note 29, at 909 ("From the Whiskey Rebellion to the Los Angeles Riots of 1992, there has been no consensus as to what constitutes either 'domestic violence' or an 'insurrection.'"); *see also* Stephen I. Vladeck, *Executive Power: Exploring the Limits of Article II: The* Field *Theory, Martial Law, The Suspension Power, and the Insurrection Act*, 80 TEMP. L. REV. 391, 434 (2007) ("[W]hat precedents exist suggest that such conditions are not subject to statutory definition but rather are based on the particular exigencies of the situation . . . .") [hereinafter Vladeck, *The* Field *Theory*].
[42] The knowing obstruction of the passage of mail is a federal crime under 18 U.S.C. § 1701.

immediately enforce the law. Does the President have the right to deploy troops unilaterally in response? The plain meaning of the Section's text suggests that the President does.[43]

Any attempt to understand the Insurrection Act is complicated further by the fact that the Act was originally passed in 1807 yet now serves as an exception to the 1878 Posse Comitatus Act. As an exception to the Posse Comitatus Act, the Insurrection Act cannot be read so broadly that it swallows the rule. If the Posse Comitatus Act reflects a strong presumption against the reasonableness of domestic military deployment, how far can the Insurrection Act be read to cut in the other direction?

A review of the Insurrection Act's legislative history does not clarify the Act's intended scope. There is no record of Congress's debate regarding the adoption of the 1807 Insurrection Act.[44] While legislative histories do exist for the 1792 Calling Forth Act and 1795 Militia Act, their utility is limited by the fact that the Insurrection Act meaningfully amended the President's authority to act unilaterally. In addition, the antecedent statutes' muddied legislative records provide little solace to eager readers seeking guidance. Section 1 of the 1792 Act, which allowed the President to repel invasions and respond to insurrections, faced little opposition in Congress.[45] Instead, Congress's debate centered on Section 2, which permitted the President to deploy the militia when the laws of the land could not be duly executed.[46] Congressman Arthur Livermore opened the floor debate by urging Congress to define more carefully the offenses the

[43] In the aftermath of Hurricane Katrina, former Office of Legal Counsel attorney John Yoo argued President Bush could have deployed the military to New Orleans to ensure federal laws that protected the delivery of mail were enforced. *See* John Yoo, Op-Ed, *Trigger Power*, L.A. TIMES (Oct. 2, 2005, 12:00 AM), https://www.latimes.com/archives/la-xpm-2005-oct-02-oe-yoo2-story.html.
[44] Vladeck, *Emergency Power and the Militia Acts*, *supra* note 31, at 164 n.64 (citing ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCE IN DOMESTIC DISORDERS, 1789-1878, at 83 n.46 (1988)). As Professor Vladeck notes, the absence of any explanation for the subtle changes incorporated in the 1807 Act creates "a rather uncomfortable mystery." *Id.* at 165.
[45] Hoffmeister, *supra* note 29, at 874–75; *id.* at 159.
[46] Militia Act of 1795, § 2, 1 Stat. at 424.

Act intended to guard against.[47] Congressman Abraham Clark agreed, claiming the Act's language was so broad that an old woman striking an excise officer with a broomstick could be deemed an insurrection.[48] Congressman Alexander White responded that prior efforts to craft more exact definitions only made the Act more confounding.[49] Some Representatives felt Section 2 would impede on the rights of the states and was more likely to excite rather than quell insurrections,[50] while others felt Section 2 would be necessary to ensure civil order.[51] In the end, Congress enacted the broad Calling Forth Act without ever agreeing on the scope of its delegation to the President.

Rather than adopt precise definitions or build in additional safeguards, the subsequent 1795 Militia Act only broadened the President's statutory authority.[52] The Ninth Congress signaled its approval of President Washington's handling of the Whiskey Rebellion by making the statute permanent, by removing a requirement that the President first seek judicial approval, and by eliminating a provision that only allowed the President to act when Congress was in session.[53] Congress barely considered whether it was constitutionally permissible to use the military to enforce domestic law.[54] The fears many members of Congress articulated during the floor debates of 1792 appeared a distant memory by 1795.

[47] 3 ANNALS OF CONG. 574 (1792).
[48] *Id.* at 575.
[49] *Id.* at 574.
[50] *Id.* at 575–76.
[51] *Id.* at 576.
[52] See *supra* note 31 and accompanying text.
[53] *See* ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCE IN DOMESTIC DISORDERS, 1789-1878, at 67 (1988) (detailing Congress's enactment of the 1795 Militia Act).
[54] *See* Banks, *supra* note 5, at 60 n.123 (noting "[t]here was no significant debate" regarding whether the Constitution permitted a standing army rather than a militia to be deployed domestically).

Recognizing that neither the text nor the legislative history of the Insurrection Act provides clear limits on the President's authority to unilaterally deploy the military domestically, this Essay turns to precedent to see if history reveals any constraints.

II. The Limited Precedent on the Insurrection Act's Unilateral Invocation

Presidents rarely unilaterally invoke the Insurrection Act. When they did, they customarily only invoked it as a last resort.[55] Prior Presidents' invocation of the Act demonstrate this recurrent reluctance.

The only unilateral invocations of the Insurrection Act during the twentieth century occurred in the context of the civil rights movement by President Eisenhower and President Kennedy. In 1957, President Eisenhower deployed federal troops against the will of local officials to integrate a Little Rock, Arkansas high school. After the U.S. District Court for the Eastern District of Arkansas ordered a Little Rock high school be integrated, Governor Orval Faubus directed the Arkansas National Guard to maintain the school's segregated structure. In the coming days, mob violence ensued. President Eisenhower initially expressed reluctance at the idea of deploying troops domestically, finding the option to be "abhorrent" and offensive to the "common sense" of the nation.[56] But, as tensions in Little Rock rose, President Eisenhower relented to political pressure and invoked Sections 252, 253, 254 of the Insurrection Act in an executive order.[57] President Eisenhower recognized that the invocation constituted a political taboo. In announcing his decision, the President emphasized that the extraordinary situation in Little Rock called for an extraordinary employment of federal power.[58] The President's Attorney

[55] As Attorney General Charles Devens explained to President Rutherford B. Hayes, "a resolute and determined effort should be made to execute the laws of the United States" before the Act is invoked. 16 Op. Att'y Gen. 162 (1878).
[56] PAUL J. SCHEIPS, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC ORDERS, 1945–1992, at 21 (2012).
[57] Exec. Order No. 10,730, 22 Fed. Reg. 7628 (Sept. 23, 1957).
[58] Brigham Daniels, *When Agencies Go Nuclear: A Game Theoretic Approach to the Biggest Sticks in an Agency's Arsena*l, 80 GEO. WASH. L. REV. 442, 450 (2012).

General in turn defended the invocation by noting Arkansas Governor Faubus failed to discharge his duty and quell the violence either due to indifference or repudiation.[59]

President John F. Kennedy similarly employed the Insurrection Act to enforce a federal court's order that required the University of Mississippi to desegregate. Mississippi Governor Ross Barnett sought to ignore a court order that required the University of Mississippi to permit James Meredith to register as a student. Federal marshals enforcing the order faced an unruly mob armed with bricks and bottles upon their arrival to the college campus. Meanwhile, Governor Barnett gave a passionate speech at an Ole Miss football game where he called on Mississippians to prepare to respond to the impending federal invasion.[60] President Kennedy's initial desire to reach an amicable agreement between the state and federal governments proved impossible. In an effort to ensure all citizens enjoyed equal protection of the laws, President Kennedy deployed troops to the college campus after invoking Sections 252 and 253 of the Insurrection Act in an executive order. Like Eisenhower, President Kennedy viewed the invocation of the Act as a last resort, but he recognized that he could not tolerate Mississippi's continued obstruction of a federal court order.[61]

Circumstances during which Presidents opted not to invoke the Insurrection Act also demonstrate how seriously Presidents regard the unilateral domestic deployment of the military. During Hurricane Katrina, President George W. Bush's administration debated whether the Insurrection Act enabled the President to deploy troops to restore order in disaster-stricken New

[59] 41 Op. Att'y Gen. 313 (1957).
[60] *See* Debbie Elliott, *Integrating Ole Miss: A Transformative, Deadly Riot*, NPR (Oct. 1, 2012, 3:30 AM), https://www.npr.org/2012/10/01/161573289/integrating-ole-miss-a-transformative-deadly-riot (describing how tensions rose during the standoff between President Kennedy and Governor Barnett).
[61] *See* Richard Altieri & Margaret Taylor, How Presidents Talk About Deploying the Military in the United States, LAWFARE (June 16, 2020, 8:14 AM), https://www.lawfareblog.com/how-presidents-talk-about-deploying-military-united-states (noting President Kennedy believed "all avenues and alternatives, including persuasion and conciliation, had been tried and exhausted").

Orleans. Louisiana Governor Kathleen Blanco had refused to request federal aid, asserting that Louisiana had the situation under control and should continue to be in charge.[62] The Department of Justice's Office of Legal Counsel advised the White House that the federal government could deploy troops over the objection of the Louisiana Governor, but President Bush decided against invoking the Act.[63] The Bush administration worried that the public would perceive the Act's invocation as an affront on the sovereignty of the State of Louisiana.[64] Explaining why President Bush opted not to send troops, Assistant Secretary of Defense for Homeland Security Paul McHale observed, "[c]ould we have physically moved combat forces into an American city, without the governor's consent, for purposes of using those forces … for law enforcement duties? Yes… . Would you have wanted that on your conscience?"[65]

Critics of President Trump's hypothetical invocation of the Insurrection Act may argue that a rise in violent urban crime, while concerning, pales in comparison to the severity of the situations prior Presidents encountered. Large American cities experienced a sharp rise in homicides in the first half of 2020,[66] but federal courts and local governments continued to operate unimpeded. No locality ignored federal court orders or threatened the Constitution's equal protection guarantees, and no breakdown in civil order resulted.

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[62] William M. Arkin, *We Didn't Need the Insurrection Act After Hurricane Katrina and Don't Need It Now*, NEWSWEEK (June 4, 2020, 3:48 PM), https://www.newsweek.com/we-didnt-need-insurrection-act-after-hurricane-katrina-dont-need-it-now-1508798. The Governor also feared the state government would be blamed for not acting sooner if the federal government succeeded in taking over. Sean McGrane, Note, *Katrina, Federalism, and Military Law Enforcement: A New Exception to the Posse Comitatus Act*, 108 MICH. L. REV. 1309, 1327 (2010).

[63] Michael Greenberger, *Did the Founding Fathers Do "A Heckuva Job"?, Constitutional Authorization for the Use of Federal Troops to Prevent the Loss of a Major American City*, 87 B.U. L. REV. 397, 406–07 (2007).

[64] *See* McGrane, *supra* note 62, at 1326 (2010) (acknowledging that President Bush's concerns about the Act's invocation were feared root in federalism concerns).

[65] *Id.* at 1329 (quoting Eric Lipton et al., *Storm and Crisis: Government Assistance; Breakdowns Marked Path from Hurricane to Anarchy*, N.Y. TIMES, Sept. 11, 2005, at 1).

[66] *See* Jon Hilsenrath, *Homicide Spike Hits Most Large U.S. Cities*, WALL ST. J. (Aug. 2, 2020 3:08 PM), https://www.wsj.com/articles/homicide-spike-cities-chicago-newyork-detroit-us-crime-police-lockdown-coronavirus-protests-11596395181.

Critics of President Trump also might take issue with the scale of his hypothetical deployment. Before invoking the Insurrection Act, Presidents Eisenhower and Kennedy pinpointed the civil unrest they sought to address and framed the episodes as the failure of one locality to maintain domestic order. In comparison, President Trump desired to send troops into cities all across the nation. President Trump may struggle to demonstrate such an extensive response is warranted when no common enemy or obstacle is threatening the maintenance of civil order across all of these cities, especially when impacted cities will vary in how effectively they respond to any unrest.[67]

Given past Presidents' hesitant and restricted unilateral invocations of the Insurrection Act, President Trump's proposed invocation would consequently appear unprecedented. The question then remains whether the courts would be willing to scrutinize such an exceptional display of executive power.

III. The Supreme Court and the Court of Public Opinion

If an aggrieved party demands judicial review of President Trump's invocation of the Insurrection Act, courts will need to consider the scope of the President's statutory authority. Because the Act's language is broad and somewhat ambiguous, this examination would inevitably require the courts to consider whether the President could act given the exigencies of the situation.[68] No case on the Act has ever reached the challenge's merits. One petition claimed President Eisenhower did not have any authority to police the schools of Little Rock following

[67] President Trump may try to frame the "radical left" and "Antifa" as the common enemy responsible for the nation's recent riots. *See* Donald Trump, President, Remarks by President Trump at Kennedy Space Center (May 30, 2020), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-kennedy-space-center/ (blaming recent violence and vandalism on the radical left and Antifa).
[68] *See* Vladeck, *The* Field *Theory*, *supra* note 41, at 434 (2007).

his invocation of the Act, but the Eighth Circuit ultimately dismissed the appeal on procedural grounds.[69]

Precedent suggests the courts may be unwilling to make this determination if they deem any judgment on the exigencies of the situation to present a political question. Discretionary military decisions are typically not subject to judicial review.[70] During past challenges to the domestic deployment of the military, courts have customarily deferred to the executive and legislative branches. A review of *Martin v. Mott*,[71] *Luther v. Borden*,[72] and *Monarch Insurance Co. v. District of Columbia*[73] demonstrates this tradition of deference.

In *Mott*, a soldier questioned the President James Madison's statutory authority to call New York's militia during the War of 1812 under the 1795 Militia Act. Writing for a unanimous Supreme Court, Justice Joseph Story granted great deference to the President's determination regarding whether an exigency existed, stating "that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons."[74] While the President's invocation of the militia might be reviewed to determine if damages are owed to an aggrieved party, a judge or jury cannot second-guess the President's initial decision to call on the militia.[75]

In *Luther*, when President John Tyler deployed troops in Rhode Island under the 1795 Militia Act, the Supreme Court similarly ruled that "the power of deciding whether the exigency

[69] Jackson v. Kuhn, 254 F.2d 555 (8th Cir. 1958).
[70] *See, e.g.*, Tiffany v. United States, 931 F.2d 271, 278 (4th Cir. 1991) ("The decisions whether and under what circumstances to employ military force are constitutionally reserved for the executive and legislative branches."); DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973) (determining military decisions to be nonjusticiable political questions).
[71] 25 U.S. (12 Wheat.) 19 (1827).
[72] 48 U.S. (7 How.) 1 (1849).
[73] 353 F. Supp. 1249 (D.D.C. 1973).
[74] *Martin*, 25 U.S. (12 Wheat.) at 30.
[75] Vladeck, *The* Field *Theory*, *supra* note 41, at 435–36 (reviewing Justice Story's opinion in *Mott*).

had arisen . . . is given to the President."[76] The Court recognized judicial deference might permit the President to abuse his power, but it felt that courts possessed no authority to question the President's decision. Ultimately, the President's "elevated office" and sense of "high responsibility" provided powerful safeguards against abuse.[77] If the President abused his discretion or violated the peoples' rights, Congress would need to determine the proper remedy after the fact.[78]

Even as the President's executive power has expanded and the might of the military has grown, courts have declined to stray from these early precedents. After protests erupted in Washington, D.C. following the assassination of Martin Luther King, Jr., an insurance company claimed the federal government negligently failed to protect the nation's capital against domestic violence. Citing *Mott* and *Luther*, the District Court for the District of Columbia in *Monarch* held that the decision whether to deploy the military to quell civil disorder was "exclusively within the province of the President" and therefore not subject to judicial review.[79]

These precedents indicate a court may treat the issue of whether President Trump correctly deployed troops domestically as a political question. However, if a court were to wade into such a controversy, it would not be completely without precedent. The most notable exception to this otherwise stable jurisprudence is *ex parte Milligan*, in which the Supreme Court overruled President Lincoln's decision to implement military commissions in the place of civilian courts after he declared martial law.[80] The Court noted that Congress never ordained the military commission as a court and that the President "is controlled by law, and has his

[76] *Luther*, 48 U.S. (7 How.) at 45.
[77] *Id.* at 44.
[78] *Id.* at 45.
[79] Monarch Ins. Co. v. District of Columbia, 353 F. Supp. 1249, 1254–55 (D.D.C. 1973).
[80] 71 U.S. 2 (1866).

appropriate sphere of duty, which is to execute, not to make, the laws."[81] The establishment of martial law did not permit the executive to exercise Congress's power to authorize trial by military commission.[82]

The Supreme Court in *ex parte Milligan* mustered the courage to intervene because of the brazen nature of President Lincoln's actions. His establishment of martial law would "destroy[] every guarantee of the Constitution, and effectively renders the 'military independent of and superior to the civil power.'"[83] President Lincoln plainly overstepped his executive authority, and no delegation from Congress empowered him to do so. In comparison, President Trump's invocation of the Insurrection Act would not be so bold. In *ex parte Milligan*, the Court went on to clarify that martial law can still be proclaimed when appropriate.[84] So long as Congress possesses constitutional authority to delegate a power to the President and does so through legislation, the President may execute that law within the confines of his statutory authority. While President Lincoln could not find reprieve in any delegation of power of Congress, President Trump could point to the broad text of the Insurrection Act and argue he remained in the sphere of his duty when executing the law. A court may find President Trump's employment of the Insurrection Act to be just as brazen to President Lincoln's establishment of martial law, but the broad language of the Act implies Congress welcomed the President's assessment of the exigencies of the situation.

Duncan v. Kahanamoku,[85] a 1946 case in which the Court considered whether the Hawaiian Organic Act permitted the replacement of courts of law with military tribunals,

[81] *Id.* at 121.
[82] *Id.* at 137.
[83] *Id.* at 124.
[84] *Id.* at 126.
[85] 327 U.S. 305 (1946).

provides another precedent in which the Supreme Court questioned military intervention into domestic affairs.[86] In *Duncan*, the Court held trial by military tribunal to be unconstitutional. In a concurring opinion, Justice Frank Murphy went so far as to say that the usurpation of civilian authority by the military deserves the Court's "complete and outright repudiation."[87] However, the majority in *Duncan* distinguished between domestic military intervention intended to supplant courts with military tribunals and military intervention intended to ensure the protection of orderly civil government.[88] In a case where the President deployed the military to restore civil order rather than disrupt court proceedings, *Duncan* likely would not apply. To the contrary, by distinguishing these two types of military intervention, the Court in *Duncan* implicitly endorsed the Act's authorization of domestic military involvement when needed to maintain domestic order.[89]

If a court finds these precedents to be controlling, an aggrieved party alternatively may seek to demonstrate that Congress disagrees with the President's invocation of the Act, thereby casting doubt on whether Congress had intended the President to have the authority to take unilateral action. As Justice Jackson famously explained in his *Youngstown* concurrence, a President's power will be at its lowest ebb when his actions go against the "express or implied will of Congress."[90] This argument would require Congress to oppose military invention, opposition that is unlikely to come to fruition during President Trump's administration so long as

[86] Joseph Nunn, a Fellow at the Brennan Center, argues that, in line with *Duncan*, the Court would be willing to review a President's decision to domestically deploy the military and would interpret any statute that authorizes military intervention in domestic affairs narrowly. *See* Joseph Nunn, *Martial Law in the United States: Its Meaning, Its History, and Why the President Can't Declare It*, BRENNAN CTR. (Aug. 20, 2020), https://www.brennancenter.org/our-work/research-reports/martial-law-united-states-its-meaning-its-history-and-why-president-cant.
[87] *Duncan*, 327 U.S. at 325 (Murphy, J., concurring).
[88] *See id.* at 324.
[89] *See id.* (emphasizing that the Organic Act was "intended to authorize the military to act vigorously for the maintenance of an orderly civil government" rather than permit the replacement of civilian courts).
[90] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

the Republicans maintain control over one house of Congress.[91] Even if Congress did oppose military intervention, a *Youngstown* argument will gain little traction with the courts. To find the President went against Congress's will when he deployed the military domestically, a court would first need to decide the President overstepped the statutory authority Congress granted him.[92] This would lead a court to again consider the broad text of the Insurrection Act, text that this Essay earlier suggested a court would deem to be too political to be subject to judicial review.[93] If Congress desires to rein in the President, it is free to do so through its own legislative process.

Despite the lack of applicable precedent to rely on, courts still may take issue with President Trump's decision to invoke the Act in light of prior unilateral invocations. The nation is not at war, and no federal court order is being ignored by a locality. Local unrest may have justified the invocation of the Insurrection Act in the past, but the modern militarization of local law enforcement means municipalities are well-equipped to handle domestic disturbances.[94] Unless he can demonstrate the locality's police force cannot manage on its own, the President has overstepped his statutory authority.

President Trump could in turn respond that urban crime is obstructing the execution of federal law, and that the Insurrection Act's text empowers the President to make the determination that federal aid is necessary.[95] The Act's broad language invites the President to

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[91] See *infra* notes 110–112 and accompanying text.
[92] *See* Vladeck, *The* Field *Theory*, *supra* note 41, at 417 n.181 (explaining that because President Washington invoked the 1792 Calling Forth Act when he deployed troops to the Whiskey Rebellion, critiques of the decision must center on the President's statutory rather than constitutional authority).
[93] *But cf.* Nunn, *supra* note 86 (arguing Congress has "created such a dense and comprehensive network of rules" that any domestic deployment of the military by the President can be assumed to be against the will of Congress).
[94] *See* Steven Bynum & Jerome McDonnell, *Spotlight: A History of Police Militarization*, WBEZ (Sept. 9, 2017, 12:00 AM), https://www.wbez.org/stories/spotlight-a-history-of-police-militarization/1c029d14-a0e1-4e26-bf94-a0c6ae500036 (examining the decades-long trend of police militarization in America).
[95] *See* Patricia Hurtado & Bon Van Voris, *What the Law Says About Deploying Troops on U.S. Soil*, WASH. POST (June 3, 2020, 5:34 AM), https://www.washingtonpost.com/business/what-the-law-says-about-deploying-troops-on-

consider whether the exigencies of a domestic situation warrant federal intervention. The courts may be unwilling to engage in a fact-finding mission to determine just how dramatically urban crime has affected domestic life. So long as a court does not find the President had clearly abused his authority under the Act, precedent suggests it will likely defer to the President's judgment regarding whether federal involvement is necessary.

Ultimately, then, the greatest check on the President's authority under the Insurrection Act may be public and political pressure rather than the statute's text itself.[96] The public may view the President's unprompted invocation of the Act as an abuse of his executive authority and an attack on the sovereignty of the states. Americans fear big government.[97] And they increasingly do not trust the federal government to handle crises. One poll found that whereas 73% of Americans possessed either a "great deal" or a "fair amount" of trust in the federal government to handle a domestic problem in 1972, just 39% shared those sentiments in 2019.[98] Opponents of the President can frame the Act's invocation as the undertaking of a dictator.[99] If

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us-soil/2020/06/02/58f554b6-a4fc-11ea-898e-b21b9a83f792_story.html (noting Professor Noah Feldman's speculation that President Trump may be able to persuasively argue that rioting and looting "is obstructing execution of federal law to the extent that local police and the National Guard can't successfully stop violence in the streets").

[96] *See* Hoffmeister, *supra* note 29, at 904 ("[I]n the end, any retribution or penalty for improperly using or failing to use the Insurrection Act is generally administered by the public, not the courts."); Stephen I. Vladeck, *Yes, Trump Can Invoke the Insurrection Act to Deport Immigrants*, THE ATLANTIC (May 17, 2019), https://www.theatlantic.com/ideas/archive/2019/05/can-trump-use-insurrection-act-stop-immigration/589690/ (noting that the Insurrection Act's broad delegation of power requires relying on "political checks, rather than legal constraints, to circumscribe the president's authority").

[97] *See* Noam Fishman & Alyssa Davis, *Americans Still See Big Government as Top Threat*, GALLUP (Jan. 5, 2017), https://news.gallup.com/poll/201629/americans-big-government-top-threat.aspx ("Two in three Americans (67%) identify big government as the country's biggest threat.").

[98] *Trust in Government*, GALLUP, https://news.gallup.com/poll/5392/trust-government.aspx (last visited Sept. 17, 2020).

[99] Political opponents of President Trump framed his proposed military deployment during the George Floyd protests as a move of a dictator. *See* @NewYorkStateAG, TWITTER (June 1, 2020, 8:30 PM), https://twitter.com/NewYorkStateAG/status/1267614450871394307 ("We will guard the right to peaceful protest & will not hesitate to go to court to protect our constitutional rights during this time & well into the future."); Press Release, Adam Smith, U.S. Representative, Smith Statement on Trump's Intent to Invoke the Insurrection Act (June 1, 2020), https://adamsmith.house.gov/2020/6/smith-statement-on-trump-s-intent-to-invoke-the-insurrection-act ("We live in a democracy, not a dictatorship.").

faced with immediate backlash, a President may pay for the political consequences of his decision if he cannot justify his invocation of the Act.

The Insurrection Act provides for this public check on the President's authority. Before the President calls on the military under the Act, the President must order insurgents "to disperse and retire peaceably to their abodes" by proclamation.[100] This requirement ensures that the instigators of civil unrest receive fair notice that the federal government will soon quash any unlawful activity. While the proclamation may appear purely procedural, it also guarantees that the impacted community, the media, and the public-at-large are on notice that the President is set to take an extraordinary action. Every time the President considers invoking the Act, the President must therefore calculate whether the political risk of his action is worth the benefit derived. When preparing for an anti-war protest at the Pentagon in 1967, President Lyndon B. Johnson's administration considered preemptively invoking the Insurrection Act in case the demonstration later escalated out of control. The administration ultimately decided not to invoke the Act due to concerns about how the public would perceive the proclamation and subsequent military action.[101] The political costs borne from the display of executive power outweighed the benefits derived from guaranteeing the preservation of civil order.

Public and political criticism could induce a President to reassess the wisdom of invoking the Insurrection Act. Of course, this would require the public to oppose the President's invocation of the Act, an obstacle President Trump might not face. President Trump enjoys unusually stable, deeply partisan support among his base.[102] He has repeatedly blamed

[100] 10 U.S.C. § 254.
[101] *See* SCHEIPS, *supra* note 56, at 239 (noting the required proclamation "would be difficult to frame under circumstances in which violence was prospective rather than actual").
[102] Amina Dunn, *Trump's Approval Ratings So Far Are Unusually Stable– And Deeply Partisan*, PEW RSCH. CTR.: FACTTANK (Aug. 24, 2020), https://www.pewresearch.org/fact-tank/2020/08/24/trumps-approval-ratings-so-far-are-unusually-stable-and-deeply-partisan/ (finding the partisan gap in assessments of President Trump is far greater than other recent Presidents).

Democratic mayors for failing to manage urban crime,[103] crime he has claimed will soon threaten America's suburban sanctuaries.[104]

The public appears to share President Trump's concern. When President Trump first considered sending troops into American cities in early June 2020, polls found that a majority of Americans would approve of the decision.[105] One poll found that even amongst respondents who disapproved of President Trump's job thus far, 49% would support the employment of the military to aid city law enforcement in their fight against violence.[106] President Trump views a war on urban crime as a political opportunity. A crackdown on crime could fortify his status as a "law and order" President.

If sufficient public pressure fails to mount, President Trump may fear a perceived abuse of executive power will prompt Congress to amend the Act and limit the President's unilateral authority. Unilateral invocation of the Act only occurs when a state's legislature and governor decline to request federal assistance. Consequently, any independent decision by the executive to deploy troops is likely to generate political conflict between the local and federal governments. Officials from other states may in turn fear that they too could see their sovereignty infringed upon and lobby Congress to act swiftly. In the wake of President Eisenhower's decision to deploy troops into Little Rock, Congress considered but ultimately declined to amend the

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[103] *See* German Lopez, *Trump Claims Crime Is Up in US Cities. The Truth Is More Complicated.*, VOX (Aug. 27, 2020, 1:40 PM), https://www.vox.com/2020/8/3/21334149/trump-rnc-murders-crime-shootings-protests-riots (observing that President Trump characterizes America's Democratic cities as "lawless and chaotic").
[104] *See* Ayesha Rascoe, *How Trump's Rhetoric on Crime Has Evolved Over Time*, NPR (Aug. 26, 2020, 4:07 PM), https://www.npr.org/2020/08/26/906333370/how-trumps-rhetoric-on-crime-has-evolved-over-time (explaining how Trump uses fear about urban crime so that he can exhibit himself to be the "protector of the suburbs").
[105] *See* Kendall Karson, *52% of Americans Support Deploying Military to Control Violent Protests: Poll*, ABC NEWS (June 7, 2020, 9:06 AM), https://abcnews.go.com/Politics/52-americans-support-deploying-military-control-violent-protests/story?id=71097167; MORNING CONSULT, NATIONAL TRACKING POLL #2005131, at 196 (2020), https://assets.morningconsult.com/wp-uploads/2020/06/01181629/2005131_crosstabs_POLICE_RVs_FINAL_LM-1.pdf (finding 58% of registered voters would support deployment of the U.S. military to "supplement city policy forces" in light of the George Floyd protests).
[106] MORNING CONSULT, *supra* note 105. The poll did not specifically ask whether the public would welcome unilateral executive action.

Insurrection Act to strip the President of the power to call on the National Guard when no state requested aid.[107] When President Bush declined to invoke the Insurrection Act after Katrina, Congress amended the Insurrection Act to authorize the President to unilaterally deploy troops during domestic emergencies such as natural disasters.[108] After all fifty governors voiced their opposition to this modification, Congress quickly repealed the revision.[109]

Despite at least one senator advocating for new legislation to limit domestic military employment after President Trump contemplated employing the Invocation Act after the George Floyd protests,[110] Congress is unlikely to intervene either. Leading up to the 2020 election, the Republican Party continues to control the majority in the Senate. Republican members of Congress remain in lockstep with the President despite his contentious impeachment proceedings and mismanagement of the COVID-19 pandemic.[111] So long as President Trump's base's support remains strong and public concern about the rise in urban crime persists, Republicans may conclude an authoritative executive response to urban crime will benefit them politically.[112]

IV. The Power of Presidential Restraint

[107] *See* Hoffmeister, *supra* note 29, at 893–94 (noting the amendment would only permit the President to act unilaterally during times of war or invasion or when states required aid). The Florida Legislature went so far as to urge Congress not to provide payment to the troops involved in the military action. H.W.C. Furman, *Restrictions upon Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85, 129 (1960).
[108] *See* Greenberger, *supra* note 63, at 400 (overviewing the Warner Amendment's adoption).
[109] McGrane, *supra* note 62, at 1331. It is worth noting that while the nation's governors opposed the Warner Amendment's repeal, the enactment and eventual repeal received little media attention. *See* Banks, *supra* note 5, at 45 ("Few paid attention to the legislative developments, and there were no hearings or recorded debate on the proposal.").
[110] Press Release, Tim Kaine, U.S. Senator, Video: Kaine Announces NDAA Amendment to Prohibit the Use of Military Force Against Peaceful Protestors (June 2, 2020), https://www.kaine.senate.gov/press-releases/video-kaine-announces-ndaa-amendment-to-prohibit-the-use-of-military-force-against-peaceful-protesters-.
[111] *See* Todd S. Purdum, *The Price of Trump Loyalty*, THE ATLANTIC (May 25, 2020), https://www.theatlantic.com/politics/archive/2020/05/cory-gardner-trump-republicans/612007/ ("These days, Trump's hold on the GOP base is so total that Republican incumbents around the country cross him at their peril. Tribal loyalty is the new normal.").
[112] Republican Senator Tom Cotton of Arkansas publicly urged President Trump to invoke the Insurrection Act during the height of the George Floyd protests. *See* Tom Cotton, Op-Ed, *Tom Cotton: Send in the Troops*, N.Y. TIMES (June 3, 2020), https://www.nytimes.com/2020/06/03/opinion/tom-cotton-protests-military.html.

If the public supports the domestic deployment of troops and Congress remains silent, the President's own respect for the gravity of the decision may be the terminal check on his power. As noted earlier in this Essay, Presidents are traditionally reluctant to authorize such a forceful display of military strength on American soil.[113] When Presidents do invoke the Insurrection Act, they ensure the public that they have exhausted other remedies, that the military will play a limited role, and that this use of force will ultimately protect rather than hinder citizens' individual rights and liberties.[114] In these challenging moments, executives adopt a grave tone that demonstrates their appreciation for the dangers of unfettered military intervention in civilian life.[115]

President Trump's tone differentiates him from prior Presidents who considered invoking the Insurrection Act. Unlike his predecessors, President Trump did not refer to the Insurrection Act as a last resort that should be avoided at all costs. To the contrary, during the George Floyd protests, President Trump repeatedly implored cities and states to move swiftly to restrain protests, or to request federal aid quickly if they were unable.[116] Rather than display a solemn sense of duty, President Trump's comments denote a sense of excitement at the idea of "dominating" American cities.[117] A review of President Trump's time in office suggests

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[113] *See supra* Section II.
[114] Altieri & Taylor, *supra* note 61.
[115] Of course, Presidents may adopt a somber tone when speaking about the Insurrection Act because they believe it will serve them politically. For example, Bush administration officials commented that President Bush in part declined to invoke the Insurrection Act because he was concerned about the optics of him superseding a female Governor. McGrane, *supra* note 62, at 1329. Still, past Presidents' repeated attempts to avoid invoking the Insurrection Act and the somber tones they adopted upon invoking the Act suggest they appreciated the gravity of the Act's invocation. *See supra* Section II.
[116] *See, e.g.*, @realDonaldTrump, TWITTER (June 19, 2020, 10:42 PM), https://twitter.com/realDonaldTrump/status/1274170612110540806 (noting the federal government could aid intervene with Seattle protests "quickly"); @realDonaldTrump, TWITTER (June 11, 2020, 2:08 PM), https://twitter.com/realDonaldTrump/status/1271142274416562176 (imploring Seattle leadership to suppress "ugly Anarchists").
[117] *See, e.g.*, Donald Trump, President, Statement by the President (June 1, 2020), https://www.whitehouse.gov/briefings-statements/statement-by-the-president-39/ ("I have strongly recommended to every governor to deploy the National Guard in sufficient numbers that we dominate the streets.");

presidential norms do not guide his decision-making. After all, President Trump has repeatedly broken other presidential norms,[118] including customs specific to civilian-military relations.[119] There is no reason to believe that he would approach this presidential norm any differently.

V. Conclusion

President Trump may never invoke the Insurrection Act during his tenure. The President can fulfill his policy goals and highlight his "law and order" strategy through less drastic means. For example, by relying on federal agents rather than the military to aid local jurisdictions, the President can capitalize on the public's desire for a firm response to urban violence while minimizing the risk that he elicits traditional concerns regarding military intervention in civilian affairs.[120] Nevertheless, so long as the broad language of the Insurrection Act remains in effect, the threat of unilateral executive deployment persists. This Essay posits that, if courts decline to analyze a political question and no political pressure surfaces, the greatest check on the President's authority under the Act may ultimately be his own appreciation for the gravity of his powers. Leaders of our democratic institutions should question whether such a check is sufficient.

@realDonaldTrump, TWITTER (June 2, 2020, 9:33 AM), https://twitter.com/realDonaldTrump/status/1267811637811187712 ("Governor [Cuomo] refuses to accept my offer of a dominating National Guard. NYC was ripped to pieces."); @realDonaldTrump, TWITTER (June 2, 2020, 9:19 AM), https://twitter.com/realDonaldTrump/status/1267808120136511489 (asserting that the Trump administration succeeded at restoring law and order during Washington, D.C. riots by way of force and domination).

[118] *See, e.g.*, *How President Trump Pushes the Boundaries of Norms in Office*, NPR (Aug. 20, 2020, 4:04 PM), https://www.npr.org/2020/08/20/904383253/how-president-trump-pushes-the-boundaries-of-norms-in-office.

[119] *See* Jack Goldsmith, *Will Donald Trump Destroy the Presidency?*, THE ATLANTIC (Oct. 2017), https://www.theatlantic.com/magazine/archive/2017/10/will-donald-trump-destroy-the-presidency/537921/ (detailing how President Trump "has taken a wrecking ball to customs of civilian-military relations" by opting to staff military positions with civilians, urging soldiers to lobby Congress, and employing military imagery when signing unrelated executive orders).

[120] The Department of Justice's Operation Legend does just this. *See* Press Release, William P. Barr, U.S. Attorney General, Attorney General William P. Barr Announces Launch of Operation Legend (July 8, 2020), https://www.justice.gov/opa/pr/attorney-general-william-p-barr-announces-launch-operation-legend (explaining that, through Operation Legend, federal agents would be sent to combat violent crime in urban centers).

Applicant Details

First Name	**Jesse**
Last Name	**Hockenbury**
Citizenship Status	**U. S. Citizen**
Email Address	**HOCKENBURJ1@NKU.EDU**
Address	**Address** **Street** **728 Grey Stable Ln, 728** **City** **Highland Heights** **State/Territory** **Kentucky** **Zip** **41076** **Country** **United States**
Contact Phone Number	**8598148106**

Applicant Education

BA/BS From	**Northern Kentucky University**
Date of BA/BS	**December 2014**
JD/LLB From	**Northern Kentucky University--Salmon P. Chase College of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=61803&yr=2011**
Date of JD/LLB	**May 1, 2021**
Class Rank	**10%**
Law Review/ Journal	**Yes**
Journal(s)	**Northern Kentucky Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**Kentucky, Ohio**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Furnier, Robert
rfurnier@furnierlaw.com
Kreder, Jennifer Anglim
krederj1@nku.edu
(859) 572-5889
Barron, David
davembarron@yahoo.com

This applicant has certified that all data entered in this profile and any application documents are true and correct.

April 29, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

My name is Jesse Hockenbury, a Class of 2021 graduate from Northern Kentucky University - Salmon P. Chase College of Law ranked in the top 10% of my class, a Lunsford Law, Business + Technology Scholar, and MBA graduate. I am writing to express my strong interest in serving as your Judicial Law Clerk in your chambers and courtroom. I believe my combination of business, technical and legal skills make me an ideal candidate to perform the legal research, memoranda drafting, project management, and administrative tasks needed for such a position.

As for substantive experience, I currently work as a litigation attorney at BakerHostetler, a nationally recognized litigation firm. This role has providing a strong base of understanding of the discovery processes in civil litigation.

Prior to my current role, I worked at the Hamilton County Prosecutor's Office as a Legal Intern awaiting bar results. Responsibilities for this role included assisting in trial preparation and document management, obtaining records and other evidence for contested hearings and trials, drafting memoranda and correspondence, and observing litigation. Such a role provided an immense amount of experience with both litigation and the courts.

Next, during the summer of 2020 I had the unique opportunity to work on a federal criminal case. The defendant was charged with multiple counts of cyber and computer crimes. As a paralegal, I actively participated in research and the application of constitutional law and discovery standards set forth by the Federal Rules of Criminal Procedure. Based upon my unique technical background, I was able to effectively assist and lead in the analysis of computer forensics reports and communications provided by independent experts.

From October of 2019 to December of 2020, I had the great experience of serving as a Law Clerk for the Small Business and Nonprofit Law Clinic. As a clerk, I was responsible for assisting with client intake, issue identification, legal research, memorandum and opinion drafting, and providing any other required assistance to attorneys. The clinic's mission is to provide legal services to entrepreneurs and small businesses on issues such as business formation, employment law, tax liability, and contract drafting.

In addition to my professional experience, I bring a strong academic background in the areas of law, technology, and business. Most recently, I was conferred a Master of Business Administration from Northern Kentucky University. I received my Master of Science in Management Information Systems from Northern Kentucky University. Finally, I obtained my Bachelor of Science in Computer Information Technology from Northern Kentucky University.

Based upon my legal experience, research capabilities, and academic background, along with my analytical and creative thinking I can provide the research and drafting qualities you are seeking in a Judicial Law Clerk. Thank you for your time, I look forward to learning more about this opportunity.

Respectfully,
Jesse Hockenbury

Jesse Hockenbury
Attorney at Law

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Education

Juris Doctor (Ohio Bar License #101666)
Salmon P. Chase College of Law, Northern Kentucky University - Highland Heights, KY

- GPA: 3.614; Class Rank: Top 10%
- Lunsford Academy for Law, Business + Technology Scholar
- Editor, Northern Kentucky Law Review

Master of Business Administration
Northern Kentucky University - Highland Heights, KY

Master of Science, Management Information Systems
Northern Kentucky University - Highland Heights, KY

Bachelor of Science, Computer Information Technology, Minor in Computer Science
Northern Kentucky University - Highland Heights, KY

Experience

Litigation Attorney – BakerHostetler
Cincinnati, OH (March 2022 – Present)

- Conducted complex discovery and resolved ESI issues arising from the firm's role as court-appointed counsel to the SIPA Trustee for the liquidation of Bernard L. Madoff Investment Securities LLC.
- Performed factual investigation and discovery on cases arising out of the Securities Investor Protection Act (SIPA).

Legal Intern – Hamilton County Prosecutor's Office
Cincinnati, OH (August 2021 – October 2021)

- Assisted with trial preparation and document management, obtained records and other evidence for contested hearings and trials, drafted motions and correspondence, and observed proceedings.

White Collar Computer Crime Paralegal – Jennifer Kreder, Attorney at Law
Cincinnati, OH (May 2020 – August 2020)

- Drafted motions, memoranda, and briefs for a federal white-collar criminal case.
- Analyzed the results of computer forensics reports developed by an expert witness.
- Researched case law on constitutional rights, discovery of digital evidence, and statutory interpretation of cybercrimes to assist in the development of trial strategy.

Law Clerk – Small Business & Nonprofit Law Clinic
Highland Heights, KY (October 2019 – December 2020)

- Researched and drafted memoranda on discrete issues of law related to business transactions.
- Drafted legal agreements, documents, and forms including LLC formation, operating agreements, employment contracts, and terms of service.
- Met with clients, attorneys, and other professionals to discuss details of cases (facts, goals, status).

Lecturer / Associate Director, Student Projects – Northern Kentucky University
Highland Heights, KY (June 2019 – December 2020)

- Developed and implemented a project-based computer science curriculum, with a focus on experiential learning and active engagement in the classroom
- Supported and tutored struggling students inside and outside of the classroom
- Evaluated student performance and maintained an updated learning management system

IT Project Manager / Application Development Manager - Center for Applied Informatics
Highland Heights, KY (November 2014 – June 2019)

- Managed all aspects of client engagements including situation analysis, defining KPIs, budget and timeline development, project management and client communications.
- Led multidisciplinary teams to design and develop web and mobile solutions.
- Analyzed data insights and industry trends to drive solution recommendations and strategies.

Web Development Specialist I & II – Center for Applied Informatics
Highland Heights, KY (June 2011 – November 2014)

- Developed web applications to meet the needs of both internal and external clients.

Licenses & Professional Certifications

License to Practice Law: Ohio (#101666)
Supreme Court of Ohio

License to Practice Law: Kentucky (#99763)
Supreme Court of Kentucky

Project Management Professional (PMP)
Project Management Institute

Unofficial Academic Transcript – Law

Student Name: Hockenbury, Jesse D.
Student SSN: XXX-XX-9146
Student ID: 100206460
Print Date: Jun 16, 2021

Current Academic Program:
JD in Chase College of Law
Major: Law (Part-Time)

2018-2019 Fall

JD in Chase College of Law
Major: Law (Part-Time)

Course No.	Course Title	Grade	Hours	QPTS
LAW 827	Legal Analysis and Problem Solving	P	0.000	0.000
LAW 841	Torts I	B+	3.000	9.999
LAW 852	Basic Legal Skills I - Writing	B+	2.000	6.666
LAW 853	Basic Legal Skills I - Research	B+	1.000	3.333
LAW 888	Legal Studies I	P	1.000	0.000
	Legal Studies			

Academic Standing: Good Standing

	AHRS	EHRS	QHRS	QPTS	GPA
Current term	7.000	7.000	6.000	19.998	3.333
Cumulative	7.000	7.000	6.000	19.998	3.333

2018-2019 Spring

Course No.	Course Title	Grade	Hours	QPTS
LAW 843	Torts II	C+	3.000	6.999
LAW 853	Basic Legal Skills I - Research	B+	1.000	3.333
LAW 868	Basic Legal Skill II - Writing	C+	2.000	4.666
LAW 883	Legal Studies II	P	1.000	0.000
LAW 926	Law, Technology & Entrepreneurship	A	3.000	12.000

Rank: 13/42
Academic Standing: Good Standing

	AHRS	EHRS	QHRS	QPTS	GPA
Current term	10.000	10.000	9.000	26.998	3.000
Cumulative	17.000	17.000	15.000	46.996	3.133

2018-2019 Summer

Course No.	Course Title	Grade	Hours	QPTS
LAW 814	Contracts	A	6.000	24.000
LAW 994	Emerging Technologies and the Law	A	3.000	12.000

Dean's List for the Academic Year 2018-19
Academic Standing: Good Standing
University Honors: Dean's List

	AHRS	EHRS	QHRS	QPTS	GPA
Current term	9.000	9.000	9.000	36.000	4.000
Cumulative	26.000	26.000	24.000	82.996	3.458

2019-2020 Fall

Course No.	Course Title	Grade	Hours	QPTS
LAW 803	Civil Procedure I	B-	3.000	8.001
LAW 818	Legal Methods	CW	0.000	0.000
LAW 819	Criminal Law	A	3.000	12.000
LAW 880	Interviewing, Counseling, & Negotiating	A	1.000	4.000
LAW 885	Digital Commerce and the Law	A	3.000	12.000
LAW 907	Law Practice Management	A	2.000	8.000
LAW 916	Digital Crimes and Torts	A	3.000	12.000

Rank: 6/37
Academic Standing: Good Standing

	AHRS	EHRS	QHRS	QPTS	GPA
Current term	15.000	15.000	15.000	56.001	3.733
Cumulative	41.000	41.000	39.000	138.997	3.564

2019-2020 Spring

Course No.	Course Title	Grade	Hours	QPTS
LAW 805	Civil Procedure II	CR	3.000	0.000
LAW 818	Legal Methods	CW	0.000	0.000
LAW 821	Criminal Procedure	CR	3.000	0.000
LAW 877	Business Organizations	CR	4.000	0.000
LAW 880	Interviewing, Counseling, & Negotiating	A	1.000	4.000
LAW 987	Small Bus. & Non-Profit Trans. Law Clinic	CR	4.000	0.000

Due to the COVID-19 pandemic, the College of Law instituted a mandatory Credit/No Credit grading system for the spring 2020
semester, except for grades from courses completed in the beginning of the semester.
Rank: 6/37
Academic Standing: Good Standing

	AHRS	EHRS	QHRS	QPTS	GPA
Current term	15.000	15.000	1.000	4.000	4.000
Cumulative	56.000	56.000	40.000	142.997	3.575

2019-2020 Summer

Course No.	Course Title	Grade	Hours	QPTS
LAW 833	Professional Responsibility	A	3.000	12.000
LAW 862	Property	B	6.000	18.000
LAW 960	Criminal Adjudication	B+	3.000	9.999

Academic Standing: Good Standing

	AHRS	EHRS	QHRS	QPTS	GPA
Current term	12.000	12.000	12.000	39.999	3.333
Cumulative	68.000	68.000	52.000	182.996	3.519

Unofficial Academic Transcript – Law

Student Name: Hockenbury, Jesse D.
Student SSN: XXX-XX-9146
Student ID: 100206460
Print Date: Jun 16, 2021

2020-2021 Fall

Course No.	Course Title	Grade	Hours	QPTS
LAW 809	Constitutional Law I	B+	3.000	9.999
LAW 845	Wills and Trusts	C+	3.000	6.999
LAW 893	IP/Intangible Rights: Draft & Neg. Strat.	A	3.000	12.000
	Satisfies Advanced Writing Requirement/Drafting Component			
LAW 961	Supervised Independent Research	A+	3.000	12.999
LAW 987	Small Bus. & Non-Profit Trans. Law Clinic	A	3.000	12.000

Rank: 5/35
Academic Standing: Good Standing

	AHRS	EHRS	QHRS	QPTS	GPA
Current term	15.000	15.000	15.000	53.997	3.600
Cumulative	83.000	83.000	67.000	236.993	3.537

2020-2021 Spring

Course No.	Course Title	Grade	Hours	QPTS
LAW 811	Constitutional Law II	A-	3.000	11.001
LAW 823	Evidence	A	4.000	16.000
LAW 899	UCC Basics	A-	3.000	11.001
LAW 927	Law for Digital Entrepreneurs	A	3.000	12.000
LAW 943	Law Review	P	3.000	0.000

Rank: 3/33

	AHRS	EHRS	QHRS	QPTS	GPA
Current term	16.000	16.000	13.000	50.002	3.846
Cumulative	99.000	99.000	80.000	286.995	3.587

2020-2021 Summer

Course No.	Course Title	Grade	Hours	QPTS
LAW 925	Family Law	**	3.000	0.000

	AHRS	EHRS	QHRS	QPTS	GPA
Current term	3.000	0.000	0.000	0.000	0.000
Cumulative	102.000	99.000	80.000	286.995	3.587

Northern Kentucky University Unofficial Academic Transcript – Undergraduate

Student Name: Hockenbury, Jesse David
Student SSN: XXX-XX-9146
Student ID: 100206460
Print Date: Jun 28, 2015

Degree Awarded:
Bachelor of Science Dec 13, 2014
College of Informatics
Major: Computer Information Technology
Minor: Computer Science
GPA: 3.242

Secondary School:
Eastern High School Aug 2007 - Jun 2011

Test Score:

10-01-2010	ACT1	ENGLISH=25, MATH=26, READING=30, SCIENCE=27, COMPOSITE=27
04-01-2011	ACT1	ENGLISH=26, MATH=26, READING=31, SCIENCE=26, COMPOSITE=27
11-12-2014	PSR	ENGLISH=999, MATH=999, READING=999

2011-2012 Fall

BS in College of Informatics
Major: Computer Information Technology Major

Course No.	Course Title	Grade	Hours	QPTS
CIT 130	Information Technology Fundamentals	C-	3.000	5.001
ENG 151H	Honors Freshman Composition	B	3.000	9.000
HNR 101	Honors First-Year Seminar The British Invasion: Intro Film Course	C	3.000	6.000
INF 120	Elementary Programming	B+	3.000	9.999
MAT 185	Introductory Discrete Mathematics	W	3.000	0.000

Academic Standing: Good Standing

	AHRS	EHRS	QHRS	QPTS	GPA
Current term	15.000	12.000	12.000	30.000	2.500
Cumulative	15.000	12.000	12.000	30.000	2.500

2011-2012 Spring

Course No.	Course Title	Grade	Hours	QPTS
CIT 247	Networking Fundamentals	W	3.000	0.000
INF 260	Object-Oriented Programming I	C+	3.000	6.999
INF 260L	Object-Oriented Programming Lab	B+	1.000	3.333
INF 282	Introduction to Databases	A-	3.000	11.001
INF 286	Introduction to Web Development	A	3.000	12.000
MIN 221	Visual Design for Digital Media	B	3.000	9.000

Academic Standing: Good Standing

	AHRS	EHRS	QHRS	QPTS	GPA
Current term	16.000	13.000	13.000	42.333	3.256
Cumulative	31.000	25.000	25.000	72.333	2.893

2012-2013 Fall

Course No.	Course Title	Grade	Hours	QPTS
CSC 360	Object-Oriented Programming II	B-	3.000	8.001
JUS 101	Introduction to Criminal Justice - SB	A-	3.000	11.001
JUS 204	Criminal Investigation	B	3.000	9.000
PHI 210	Ethics of Information Technology	B-	3.000	8.001
PSC 100H	American Politics - SB	B	3.000	9.000

Academic Standing: Good Standing

	AHRS	EHRS	QHRS	QPTS	GPA
Current term	15.000	15.000	15.000	45.003	3.000
Cumulative	46.000	40.000	40.000	117.336	2.933

2012-2013 Spring

Course No.	Course Title	Grade	Hours	QPTS
CIT 247	Networking Fundamentals	C	3.000	6.000
CMST101	Public Speaking - OC	A-	3.000	11.001
CSC 301	Web Programming	B	3.000	9.000
JUS 320	Adv Crime Scene Tech & Criminalistics	B+	3.000	9.999
POP 205	Introduction to Popular Culture - AH	C+	3.000	6.999

Academic Standing: Good Standing

	AHRS	EHRS	QHRS	QPTS	GPA
Current term	15.000	15.000	15.000	42.999	2.867
Cumulative	61.000	55.000	55.000	160.335	2.915

2012-2013 Summer

Course No.	Course Title	Grade	Hours	QPTS
BIS 330	IT Project Management	A-	3.000	11.001
CEP 300	Cooperative Education	P	3.000	0.000

Academic Standing: Good Standing
University Honors: Scholar's List

	AHRS	EHRS	QHRS	QPTS	GPA
Current term	6.000	6.000	3.000	11.001	3.667
Cumulative	67.000	61.000	58.000	171.336	2.954

2013-2014 Fall

BS in College of Informatics
Major: Computer Information Technology
Minor: Computer Science

Course No.	Course Title	Grade	Hours	QPTS
CIT 371	Unix Systems	A	3.000	12.000
CSC 364	Data Structures and Algorithms	C+	3.000	6.999
CSC 399	Interm Dir Read & Ind Study:Comp Science Advanced PHP and Java Script	A	3.000	12.000
JUS 404	Evidence Prep & Courtroom Test	A	3.000	12.000
MAT 185	Introductory Discrete Mathematics	B	3.000	9.000

Academic Standing: Good Standing

	AHRS	EHRS	QHRS	QPTS	GPA
Current term	15.000	15.000	15.000	51.999	3.467
Cumulative	82.000	76.000	73.000	223.335	3.059

Northern Kentucky University Unofficial Academic Transcript – Undergraduate

Student Name: Hockenbury, Jesse David
Student SSN: XXX-XX-9146
Student ID: 100206460
Print Date: Jun 28, 2015

2013-2014 Spring

Course No.	Course Title	Grade	Hours	QPTS
CEP 300	Cooperative Education	P	3.000	0.000
CIT 271	Windows Administration	B+	3.000	9.999
CIT 383	Scripting I	A	3.000	12.000
CIT 436	Web Server Administration	B	3.000	9.000
CIT 499	Advanced Ind Study Web Design Competition	A	3.000	12.000
EMB 100	Media Literacy - AH	A-	3.000	11.001
ENG 347	Technical Writing	A	3.000	12.000

Academic Standing: Good Standing
University Honors: Dean's List

	AHRS	EHRS	QHRS	QPTS	GPA
Current term	21.000	21.000	18.000	66.000	3.667
Cumulative	103.000	97.000	91.000	289.335	3.180

2013-2014 Summer

Course No.	Course Title	Grade	Hours	QPTS
CEP 300	Cooperative Education	P	3.000	0.000
CIT 499	Advanced Ind Study ZEND PHP CERTIFICATION	A	2.000	8.000
SOC 101	Global Inequalities - SB	A	3.000	12.000

Academic Standing: Good Standing
University Honors: Scholar's List

	AHRS	EHRS	QHRS	QPTS	GPA
Current term	8.000	8.000	5.000	20.000	4.000
Cumulative	111.000	105.000	96.000	309.335	3.222

2014-2015 Fall

Course No.	Course Title	Grade	Hours	QPTS
CEP 300	Cooperative Education	P	3.000	0.000
CIT 472	Database Administration	A	3.000	12.000
CIT 496	Senior Practicum	A	3.000	12.000
GLY 110	The Face of the Earth with Lab - SL	B	4.000	12.000
JUS 231	Race, Gender and Crime - AH	B-	3.000	8.001

Academic Standing: Good Standing

	AHRS	EHRS	QHRS	QPTS	GPA
Current term	16.000	16.000	13.000	44.001	3.385
Cumulative	127.000	121.000	109.000	353.336	3.242

NKU CHASE
COLLEGE OF LAW

June 6, 2021

RE: *Letter of Recommendation for Hockenbury, Jesse D.*

To Whom It May Concern:

I write to highly recommend Jesse Hockenbury for a judicial clerkship. Since 2017, after nearly 35 years in active practice, I have taught at Chase College of Law, Northern Kentucky University, and served as the Director of the Chase Small Business & Nonprofit Clinic and of the W. Bruce Lunsford Academy for Law Business + Technology. Jesse was among the best and brightest of the hundreds of law students I have taught in my four-year tenure at Chase. Undoubtedly, Jesse will be among the best and brightest clerks that have clerked for you.

I have known Jesse since January 2019 when he was a first-year law student and Lunsford Scholar at Chase. Indeed, I undoubtedly know Jesse and his work better than any other Chase professor or administrator, as Jesse was enrolled in seven of my classes and worked with me outside the classroom. The Lunsford Academy is an honors program restricted only to students with the strongest academic credentials. Jesse proved worthy of his selection, earning A's in all of the classes that I taught him.

I helped create, and have taught, a law and technology curriculum of nine courses for students in both our Juris Doctor and Master of Legal Studies programs. Technology is transforming both the substance and practice of law. Our curriculum, available to Lunsford scholars and all other Chase students, helps to train lawyers on the impact that technology has, and will have, on all aspects of the law and on the legal profession, especially as it moves into the cloud. With his undergraduate and graduate degrees in computer science and his formidable academic background in law and technology, Jesse will be an invaluable resource to any judge as courts evolve online and confront the unique challenges that technology-related litigation may pose.

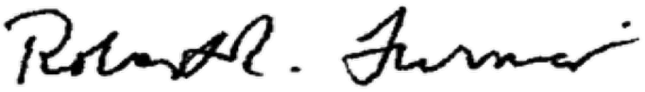
Northern Kentucky University Chase College of Law Nunn Drive Highland Heights, Kentucky 41099

As mentioned earlier, I have known Jesse in and out of the classroom. He has helped develop legal applications and participated in tech competitions under my supervision. Moreover, he spent a year serving as an intern in the Chase Small Business & Nonprofit Clinic serving clients. He was always diligent and hard working. Most importantly, Jesse is of the highest caliber as a person, honest and compassionate to a fault.

Though Jesse would not consider it noteworthy, I would be remiss if I did not mention that all his great accomplishments have come despite suffering from a significant vision impairment. In all my classes, Jesse never sought any accommodation. As a commissioner on the ABA Commission on Disability Rights, I believe that Jesse exemplifies everything we would hope for in an attorney, with or without a disability.

Jesse Hockenbury is as fine a young person as I have ever known. You would do well to hire Jesse as your judicial clerk.

Sincerely Yours,



Robert R. Furnier
(513) 604-5449
furnierr1@nku.edu

NKU SALMON P. CHASE COLLEGE OF LAW
NORTHERN KENTUCKY UNIVERSITY

January 6, 2021

Re: Recommendation of Jesse Hockenberry

Your Honor:

I first met Jesse Hockenberry in my Civil Procedure and Property classes, which accounted for six credits of Jesse's foundational courses in law school. I think it is fair to say that amongst all of the professors at Chase, I probably know Jesse best. And I give him my highest endorsement.

I was so impressed with Jesse's ideas and tech knowledge that I asked him questions about a federal case on which I was working. Jesse knew so much about the intersection of the law and technology at issue, that I asked him to work with me on it. He was instrumental in crafting a cutting edge defense. At issue were various types of software and algorithms the government uses to surveil people. The issues concerned the correct balancing for the need for governmental secrecy and a defense attorney's access to the software and algorithms to be able to defend the client. We worked a few more cases together, and he helped register a trademark for an entrepreneur. I then invited him to do a Supervised Independent Research project with me. That blossomed into two papers, which we plan to publish together on surveillance law and the potential for new legislation. His work has been outstanding.

Finally, I'd like to say that I know how important a personality can be in chambers, as I also was a federal law clerk. You would never regret hiring Jesse. He is smart, hard-working, considerate and humble. I also should mention that he has accomplished all that he has while being legally blind. His class rank is high, but I have no doubt it would be even higher had he been able to rely on vision during class periods, quizzes and exams. Because Jesse was a working evening student, he really could not benefit from long, extended exam periods and such to even the playing field. And he did so well without it. I know Jesse will be a very successful attorney, and I even find him inspirational. I would be happy to discuss him more at any time. You may contact me any time at krederj1@nku.edu or (859) 628-1152.

Sincerely,

Jennifer A. Kreder
Professor of Law

April 29, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am writing to recommend Jesse Hockenberry for a judicial clerkship. I believe his intellectual capacity, compassion for the law, intellectual curiosity, and academic performance make him ideally suited for a clerkship.

I taught Mr. Hockenberry in my criminal adjudication course, which is one of three courses I teach as an adjunct professor of law at Northern Kentucky University, Salmon P. Chase College of Law. From the beginning of the course of approximately twenty students through its conclusion, Mr. Hockenberry stood out amongst his classmates. He impressed me with his passion for the subject matter, his ability to critically analyze complex areas of law, and his ability to take the class analysis to the next level by applying the law well to a vast myriad of different, complicated circumstances. Some of that is due to simple talent. The other ingredient, too rare in law students today, was his profound long-standing interest in the law in general and in subject matters relevant to succeeding as a post-graduate clerk for a federal judge. As an attorney who has spent the past nearly eighteen years representing death-sentenced in state post-conviction and federal habeas proceedings, and as someone who has taught a law school course on federal habeas corpus, I am well aware of the complexity of matters federal district judges handle on a daily basis. My career has also made me aware that habeas corpus cases take up a significant portion of a federal district judge's docket. I have no doubt that Mr. Hockenberry is up for that task, can handle the complexity of a federal court's work, and would excel as a law clerk for a federal judge. This conclusion does not just stem just from teaching Mr. Hockenberry as part of my criminal adjudication course.

After the course concluded, Mr. Hockenberry sought me out for additional dialogue and advice as he continues to pursue his legal career, and to review and edit a draft of his law review article. I did so, and was impressed by the quality of his writing skills and analysis. It was of professional quality and needed few substantive edits, furthering my already strong opinion of Mr. Hockenberry's legal capabilities.

Mr. Hockenberry's academic performance demonstrates a level of excellent over the past few semesters that has resulted in his high class rank. On all scores, Mr. Hockenberry has earned my highest recommendation.

Sincerely,

David M. Barron

Adjunct Professor of Law, North Kentucky University Salmon P. Chase College of Law

Staff Attorney III, Kentucky Department of Public Advocacy, Capital Post-Conviction Unit

502-782-3601 (office) ; 646-279-6902 (cell)

david.barron@ky.gov ; barrond1@nku.edu ; davembarron@yahoo.com

Autonomous Criminal Investigations: Who Is Ensuring Constitutional Rights Are Protected? Who Watches the Watchers?

Abstract

Law enforcement investigators are now equipped with technological advancements that allow for the tracking, searching, measuring, detection, and identification of people's alleged criminal conduct in nearly any aspect of life. Criminal cases challenging the reliability of such technology have encompassed such activity from financial, the possession and distribution of child pornography, driving under the influence to terrorism. Evidence collected from technology-based investigations serve as the basis for probable cause, the issuance of search warrants to raid their homes, the arrest of a suspect, and serves as key evidence at trial. And the defendants rarely have the chance to even inspect the technology when there is evidence of its malfunction. Defense counsel have been met with fervent opposition asserting a lack of materiality and broad interpretations of the law enforcement exception to discovery. Courts are split, with more leaning towards protecting software to preserve its utility to catch other suspects. This article will examine the current split and provide policy recommendations on how the court should proceed to protect a defendant's due process and right to a fair trial while best serving the societal need to catch true criminals.

Introduction

Imagine, you are a vice president of a major financial institution, married with two children, and have elderly parents to care for. One evening while eating dinner you hear a knock at the door followed by voices yelling "Police." As you open the door an army of police officers, with guns drawn, swarm inside your home placing you in handcuffs, seizing all of the electronic devices in the home, and arresting you for the possession and distribution of child pornography, all of which occurs in front of your children. You adamantly refute the charges and plead not guilty to all charges. Based upon these charges, Child and Family Services gives your spouse two options abandon you or lose custody of the children. You are fired from your job and become instantly vilified in the press.

The Government states that their investigative software monitored your computers for months culminating when your computer accessed and download files. In preparation for trial, the FBI searches your electronic devices, but is unable to locate a single file you are accused of distributing on any of the devices seized. At this point, you believe you have been exonerated, but you are not, the Government proceeds citing the software's successful file download on your devices.

In an effort to prove your innocence, you proceed to trial. The only way you can prove your innocence is to prove the faultiness of the software the Government relies upon exclusively. Pursuant to the rules of criminal procedure, Rule 16, you file a discovery request for an independent expert to access, examine, and test the validity and fault tolerance of the software.[1] In response, the Government refuses your request, claiming it is immaterial to the preparation of a defense. Additionally, the Government claims the software is proprietary and covered under law enforcement privilege. The decision whether you are entitled to an independent examination will be determined by the Court.

There is one final very important fact in this scenario, you are completely innocent, you never did what they accused you of nor would you ever. Without access to the software it will become impossible for you to prove your innocence and will likely face more than 10 years in prison, for a crime you did not commit.

Courts, federal and state, are currently split as to whether a defendant is entitled to an independent examination of investigative software, when it serves as the primary piece of evidence to support a search warrant, an arrest, and inevitably a conviction.

These investigative techniques and reliance upon software continue to grow throughout the country and have become a mainstay in white-collar investigations. Any American with an electronic device could face this same exact scenario. Governmental intrusion and monitoring through the use of technological advancements, without oversight and accountability, should scare each and every American.

This note will begin by outlining each of the constitutional and procedural challenges, and potential violations, that the use of autonomous investigate software poses to a defendant when a defendant does not have proper access to examine the software. For each constitutional and procedural protection discussed, an overview of the existing law, the burden required to challenge a potential violation, and the role a lack of discovery plays will be covered. Finally, this note will address the changes that can and must be made, to prevent wrongful convictions at the hands of faulty software.

Constitutional Protections

The United States Constitution (Constitution) serves as the basis of protections and rights for all persons within the territory. The protections provided by the Constitution are intended to ensure the protection from government overreach or the encroachment upon fundamental rights.[2] The Constitution

[1] Fed. R. Crim. P. 16.
[2] *U.S. Const. amend. V, XIV.*

specifically provides several rights to those who are suspected of or who have committed criminal conduct.[3] The rights afforded to such persons include protection from: unreasonable searches and seizures; a defendant from being compelled to self-incriminate; depriving any person of life, liberty or property without due process of law; evidence being presented without the right of confrontation; and the protection from being tried more than once for the same offense.[4]

Each of these constitutional rights are being challenged, trampled upon, or even foregone when it comes to electronic devices, the data within, and transmission of such data over networks.

Fourth Amendment: Protection from Unreasonable Search and Seizure

The Fourth Amendment provides that people should be free in their persons from unreasonable searches and seizures by the government or its' agents.[5] The amendment reads:

> *"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."*[6]

A search, in the criminal context, is any encroachment or intrusion upon the reasonable and justifiable expectation of privacy.[7] Reasonableness is based upon the totality of the circumstances and whether a reasonable person would expect privacy.[8] Courts have, over the years, identified several circumstances when a search is reasonable including: a search incident to arrest, abandoned property, or an automobile.[9]

Courts have begun examining the reasonable expectation of privacy an individual has in their electronic devices and to the data within.[10] Courts have started to recognize the large role that electronics, containing gigabytes of personal data, such as cell phones, play in people's everyday lives.[11] This protection extends

[3] *U.S. CONST. amend. IV - VI.*
[4] *U.S. CONST. amend. IV - VI.*
[5] *U.S. CONST. amend. IV.*
[6] *U.S. CONST. amend. IV.*
[7] Katz v. United States, 389 U.S. 347 (1967).
[8] Katz v. United States, 389 U.S. 347 (1967).
[9] Chimel v. California, 395 U.S. 752 (1969); Arizona v. Gant, 556 U.S. 332 (2009); United States, 362 U.S. 217, 241 (1960).
[10] Birchfield v. North Dakota, 136 S. Ct. 2160 (2016).
[11] Riley v. California, 134 S. Ct. 2473 (2014) (9-0 decision).

to searches incident to arrest.[12] Police are required to obtain a warrant prior to accessing and searching the data of a mobile phone, unless consent or extreme exigent circumstances exist..[13]

Accessing an electronic device's data is not only accomplished through physical access, but additionally through network connectivity and the use of software called a trojan horse.[14]

A trojan horse, or virus, is code run on a device, often without the knowledge of the owner, that allows the author to view, search, track, alter, and control the files of a computer or similar device.[15] One 2009 study found that 14.5% of a sample of 400 downloads contained "zero-day malware," i.e., malware not detectable by current antivirus signatures or other malware detection techniques as of the day it was discovered.[16] The use of a trojan horse by police can easily be analogized as placing a GPS tracker on an automobile, an issue the courts have decided. In *U.S. v. Jones,* police attached a GPS to an automobile for more than 28 days, the Supreme Court unanimously agreed the physical intrusion of the vehicle was a search.[17] Thus, the use of trojan software to track or monitor data on a computer is a search.

The next method of accessing data on a computer is by accessing publicly shared files and folders, made possible by tools such as uTorrent a peer-to-peer networking software. On a peer-to-peer network, files can be shared directly between systems on the network without the need of a central server.[18] The use of peer-to-peer networks, the BitTorrent protocol, and the use of torrent files is completely legal, so long as the content being shared is not copyrighted or illegal by statute.[19] With the growth of such networks the government has increasingly begun to monitor such networks for illegal content. The monitoring of these network does not occur manually, but autonomously through the use of software created by the government, and often their vendors.

Autonomous software continuously searches networked computers who are offering to share torrent files known to hold illegal content, based upon a government-maintained database. The courts have sanctioned short-term

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[12] *Id.*
[13] *Id.*
[14] Jessica Conditt, FBI hacked the Dark Web to bust 1,500 pedophiles, Engadget, Jan. 7, 2016, http://www.engadget.com/2016/01/07/fbi-hacked-the-dark-web-to-bust-1-500-pedophiles.
[15] *See* Norton, What is a Trojan? Is it a virus or is it malware? (July 24,2020), https://us.norton.com/internetsecurity-malware-what-is-a-trojan.html
[16] Havard Vegge, *et al., Where Only Fools Dare Treat: An Empirical Study on the Prevalence of Zero-Day Malware*, ICIMP 2009 Fourth International Conference on Internet Monitoring and Protection, at 66-71, *available at* http://jaatun.no/papers/2009/zero.pdf (last visited July 4, 2020).
[17] United States v. Jones, 132 S.Ct. 945 (2012)
[18] *See* TechTerms, P2P (Peer to Peer) Definition (October 30, 2020), https://techterms.com/definition/p2p
[19] *See* Is it Legal to Download Torrents (November 1, 2020) https://www.hg.org/legal-articles/is-it-legal-to-download-torrents-31511

monitoring in cases such as *Knotts*, where police monitored public movements for three days, but was clear not to endorse "dragnet-type law enforcement practices".[20] More recently, in *Jones*, Justice Alito alongside other justices wrote "the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." The issue of whether monitoring torrent networks breaches the expectation of privacy has yet to be directly addressed. Based on precedent, the continuous monitoring of shared files would be highly invasive and far exceeds any waiver of privacy.

A torrent is merely a text file containing instructions on how to find, download, and assemble the file the user wants, which might be software, images, or videos, for example.[21] A torrent does not contain the content to be distributed; it only contains an index containing information about the files associated with that torrent. One bit of information included is the "SHA1 hash" that assembles the "SHA hashes" of the data associated with the torrent. SHA hashes are like fingerprints of the bundled files and are not hashes of individual files, photos or videos.[22]

To elaborate on this, a "hash value" is the product of a mathematical algorithm designed to uniquely identify the contents of a data set, such as a file or set of files.[23] Changes in a single bit of data in a file will produce a new hash value. There are different algorithms that produce different values. The most commonly used hashes are Message Digest version 5 (MD5) and Secure Hash Algorithm version 1 (SHA1), but newer more complex versions of those algorithms have been developed such as SHA2 and SHA3. According to the National Institute of Standards and Technology (NIST), the MD5 and SHA1 hash algorithms were determined to be susceptible to collision.[24] Collision happens when two different datasets or files produce the same hash.[25] Therefore, relying on these hash values to identify a file becomes problematic because the MD5 and SHA1 hash values are no longer reliable for file verification. Regardless of the unreliability of SHA1, file sharing software and law enforcement's software relies on these SHA1 hashes of torrents, known as an "info hash", and its associated files.[26]

The client software, i.e. uTorrent, reads the instructions in the torrent, finds the pieces of the target file from other BitTorrent users who have the same torrent

[20] United States v. Knotts, 460 U.S. 276 (1983)
[21] United States v. Gonzales, No. CR-17-01311-001-PHX-DGC (D. Ariz. Feb. 19, 2019).
[22] *Kenneth Hartman, Bit Torrent & Digital Contraband (May 22, 2019), available at https://www.sans.org/reading-room/whitepapers/legal/paper/36887 (SANS Institute Information Security Room Graduate Student Research White Paper). This source provides an excellent explanation of current BitTorrent functionality.*
[23] 22 Intell. Prop. & Tech. L.J. 6, 11, 22 NO. 4 Intell. Prop. & Tech. L.J. 6, 11.
[24] AccessData, MD5 Collisions: The Effect on Computer Forensics 2 (2006), available at http://www.accessdata.com/media/en_US/print/papers/wp.MD5_Collisions.en_us.pdf.
[25] 22 Intell. Prop. & Tech. L.J. 6, 11, 22 NO. 4 Intell. Prop. & Tech. L.J. 6, 11.
[26] United States v. Gonzales, No. CR-17-01311-001-PHX-DGC (D. Ariz. Feb. 19, 2019).

in a "handshake," and downloads and assembles the pieces, producing a complete file.[27] Until someone actually downloads a completed file, it is not "possessed" in any criminal sense.[28]

It cannot be stressed enough that neither info hashes, the torrents they reference, the file names, nor the hash values contained within the torrent are synonymous with downloaded files or even attempts to download a file. A torrent is merely a "catalog" that contains only textual data and does not contain any illegal content such as copyrighted images or videos.[29] By possessing a torrent, the user downloads information about files on the BitTorrent network (not even necessarily searched for personally) and may be unknowingly and even unwillingly advertising that information on the network without actually possessing the files detailed in the torrent.[30] The torrent contains information that describes the file searched for and countless other files the user did not search for. The user is not even able to see what other files the torrent describes, which may be listed in hidden files. A user downloading a torrent expecting legal content may end up possessing illegal content by accident.

The results of the monitoring are provided to police for further investigation.[31] Investigating officers use government-backed software.[32] One such software is Torrential Downpour, a modified version of BitTorrent software, that allegedly allows for the download of a suspected file directly from the suspect computer, rather than from multiple peers on the network simultaneously.[33] A "successful download" notation in the software log serves as the sole basis or evidence that supports probable cause necessary to receive a warrant.[34]

This warrant allows police to enter the defendant's home, where an expectation of privacy exists, and to seize electronic devices potentially containing contraband.[35] When an expectation of privacy exists, law enforcement is required to obtain a search warrant from a neutral and detached magistrate, based upon probable cause through evidence presented to the magistrate, and particularly describe the places to be searched and the items to be searched for.[36] Law enforcement must provide all relevant facts to the magistrate, including those that may be exculpatory to ensure fairness, as the opposing party is absent and the

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[27] Malibu Media, LLC v. John Does 5-8, 10-14, 16, 18-21, No. 12-CV-02598-WYD-MEH, 2013 WL 1777714 (D. Colo. Apr. 25, 2013).
[28] 18 U.S.C § 2252(A).
[29] 22 Intell. Prop. & Tech. L.J. 6, 11, 22 NO. 4 Intell. Prop. & Tech. L.J. 6, 11.
[30] United States v. Budziak, 697 F.3d 1105 (9th Cir. 2012);
[31] United States v. Gonzales, No. CR-17-01311-001-PHX-DGC (D. Ariz. Feb. 19, 2019).
[32] *Id*.
[33] *Id*.
[34] *Id*.
[35] Carroll v. United States, 267 U.S. 132 (1925).
[36] United States v. Ventresca, 380 U.S. 102 (1965); Carroll v. United States, 267 U.S. 132 (1925).

proceeding is ex parte.[37] Probable cause exists when there is a fair probability that a search will result in evidence of a crime being discovered.[38]

A search warrant may be based on the information of an informant and its' sufficiency to sustain probable cause is based upon a totality of the circumstances test.[39] The totality of circumstances test considers facts such as informant reliability in the past and whether other corroborating evidence exists to create credibility and reliability.[40] Reliability may not be established through conclusory statements but must be supported through underlying facts.[41] Furthermore, the Seventh Circuit Court of Appeals has stated, "reliable information in the past . . . is an unsupported conclusion which does not demonstrate probable cause."[42]

A defendant has the opportunity to attack the validity of a search warrant and the admission of any evidence obtained during an illegal search.[43] The first method of invalidating a search warrant is challenging its' lack of particularity to the location of a search and what is to be searched for.[44] The second and more likely method is to challenge the facts of an affidavit presented to the magistrate.[45] To challenge the validity of an affidavit a defendant must prove a false statement was made, the officer signing the affidavit knew or should have reasonably known the fact to be false, and that fact must have been material to the finding of probable cause.[46]

The process of collecting information in preparation of an affidavit for a search warrant has become increasingly complicated with the involvement of continuous and autonomous monitoring, the use of artificial intelligence paired with machine learning, and the reliance upon highly complex mathematical and statistical computer algorithms serving as the basis of information.[47] This paradigm shifts the credibility and reliability of information away from highly trained police officers and scientist who incorporate experience, logical reasoning, and highly consistent and repeatable certified processes.

For example, DUI traffic stops, occurring over one million times a year, routinely rely upon breathalyzer electronic devices to calculate the blood alcohol concentration (BAC) of a suspected impaired driver.[48] In an investigation by the

[37] Rainsberger v. Benner, No. 17-2521 (7th Cir. 2019).
[38] Illinois v. Gates, 462 U.S. 213 (1983).
[39] Illinois v. Gates, 462 U.S. 213 (1983).
[40] Illinois v. Gates, 462 U.S. 213 (1983).
[41] Aguilar v. Texas, 378 U.S. 108 (1964).
[42] United States v. Reddrick, 90 F.3d 1276 (7th Cir. 1996).
[43] *U.S. Const. amend. IV.*
[44] Groh v. Ramirez, 540 U.S. 551 (2004)
[45] Franks v. Delaware, 438 U.S. 154, 171-2, 98 S.Ct. 2674, 2684-5 (1978)
[46] Franks v. Delaware, 438 U.S. 154 (1978)]
[47] United States v. Gonzales, No. CR-17-01311-001-PHX-DGC (D. Ariz. Feb. 19, 2019).
[48] Birchfield v. North Dakota, 136 S. Ct. 2160, 2180, 195 L. Ed. 2d 560 (2016).

New York Times, it was found that the highly sensitive machines regularly skew the results by nearly 40% higher than expected. [49] The article went on to state "Technical experts have found serious programming mistakes in the machines' software. States have picked devices that their own experts didn't trust and have disabled safeguards meant to ensure the tests' accuracy."[50] Growing concerns have resulted in tens of thousands of tests being ignored, motions to examine and compel filed, and judges reconsidering the test's weight.[51] As a result, judges are now using language regarding the tests like "extremely questionable," a "magic black box … significant and continued anomalies"[52]

As law enforcement shifts their focus to internet crimes these very same issues have begun to arise. As previously discussed, law enforcement relies upon autonomous monitoring software that relies upon conduct, a non-illegal download of a torrent, as the basis of a search warrant.[53] Due to the nature of a computer, the search for a specific crime entails the search of every sector on its' hard drive and the networks it connects to. When the government fails to find the illegal content, by forensic examination, that the software alleged was present, they inevitably are able to find some form of illegal conduct to charge a suspect with, even if completely unrelated to the initial warrant.[54] This backdoor approach is made possible by the plain view doctrine which allows police to seize any evidence found during the normal course of their "legal" search.[55]

When the government is challenged on the reliability of search warrants it routinely argues that regardless of the question, police acted in good faith when conducting the search and thus the exclusionary rule should not apply.[56] The Supreme Court has held that police officers who act in good-faith when executing a search warrant shall not be punished by the exclusionary rule unless the underlying warrant was so lacking in probable cause that it could not have been reasonably relied upon.[57] Courts today allow police to reasonably rely upon faulty computer records as the sole basis of probable cause with no other corroboration.[58]

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[49] New York Times, These Machines Can Put You in Jail. Don't Trust Them (November 3, 2019), https://www.nytimes.com/2019/11/03/business/drunk-driving-breathalyzer.html
[50] *Id.*
[51] Florida v. Conley, No. 48 - 2012 -CT-000017- A / A (Orange County, FL September 22, 2014).
[52] Florida v. Conley, No. 48 - 2012 -CT-000017- A / A (Orange County, FL September 22, 2014) (https://int.nyt.com/data/documenthelper/1935-orange-county-decision-2014-breath-tests/d785cd5b0e65bdc10755/optimized/full.pdf#page=1)
[53] United States v. Gonzales, No. CR-17-01311-001-PHX-DGC (D. Ariz. Feb. 19, 2019).
[54] *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971).
[55] Arizona v. Hicks, 480 U.S. 321 (1987).
[56] United States v. Leon, 468 U.S. 897 (1984).
[57] United States v. Leon, 468 U.S. 897 (1984).
[58] *See* Arizona v. Evans, 514 U.S. 1 (1995) (holding a clerical error in a computer record is insufficient for the exclusionary rule to apply).

As a result, even when the investigative software makes mistakes and is the basis of a search warrant, any ancillary evidence found becomes admissible at trial.

One of the primary mistakes proponents challenge is whether the investigative software searched, monitored, or attempted to download files outside of areas publicly shared. Information obtained from an illegal search, subsequently used in a warrant could render it void. This question can only be answered through examination of the investigative software, and is material to challenging the search and Fourth Amendment protections. At least one district court has held a "request to access police investigative software met Rule 16 standard where production was relevant to whether the government violated the defendant's Fourth Amendment rights."[59]

Sixth Amendment: Right of Confrontation

The Fourth Amendment is not the only constitutional right potentially implicated by the Government's failure to produce discovery of investigative software for independent examination. The Sixth Amendment's confrontation clause is also challenged.[60] Courts have described the right of a confrontation as a "fundamental right essential to a fair trial and is made obligatory on the States by the Fourteenth Amendment."[61] The confrontation clause provides a defendant with the right to cross-examine witnesses, and the evidence they are testifying to.[62] This right extends to forensic reports offered for proof of the matter asserted and testimonial in nature.[63] For such a report, the person who performed the testing must be made available for cross-examination.[64]

The analysis of what items are testimonial have not been clear, but multiple relatively recent Supreme Court cases have aided in redefining the confrontation clause and the definition of "testimonial."[65] Testimonial is best defined as "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[66]

The issue of testimonial evidence becomes more complicated when computers, not humans, are performing the analysis and report generation, as a computer cannot testify or be cross-examined. Records that are fully-computer

[59] *See* United States v. Ocasio, No. EP—11—CR—2728—KC, 2013 WL 2458617, at *3-*4 (W.D. Tex. June 6, 2013)
[60] U.S. Const. amend. VI.
[61] Pointer v. Texas, 380 U.S. 400, 403-406 (1965).
[62] *U.S. Const. amend. IV.*
[63] Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004)
[64] Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009)
[65] Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009)
[66] Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2531 (2009) (quoting Crawford, 541 U.S. at 52).